

FILED

2014 OCT -3 PM 4:24

SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

vs.

ALICIA OLIVARES CASTANEDA,

Defendant.

NO. 13-1-00678-2

FINDINGS OF FACT AND
CONCLUSIONS OF LAW, AND
ORDER TRANSFERRING
MOTION TO VACATE
JUDGMENT AND SENTENCE
PURSUANT TO CrR 7.8 TO
COURT OF APPEALS,
DIVISION II

[CrR 7.8(c) (2)]

[CLERK'S ACTION REQUIRED]

This matter came on regularly before the undersigned judge of the above-entitled court on the motion of the defendant, Alicia Olivares Castaneda, for relief from judgment pursuant to CrR 7.8 (b). The court has reviewed the records and files herein, and the motion to vacate judgment and sentence (CrR 7.8), filed by the defendant on July 24, 2014. The motion was accompanied by a memorandum of law in support of the motion, a declaration of transcriptionist, a declaration of defendant Alicia Olivares Castaneda,

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Order Transferring Motion to Vacate
Judgment and Sentence Pursuant to
CrR 7.8 to Court of Appeals, Division II

and a declaration of Gabriel Garcia-Murillo. The court also reviewed a declaration of Gerald Wear, filed September 11, 2014; a preliminary response to defendant's CrR 7.8 motion to vacate judgment, filed September 24, 2014; and a response to State's reply to defense motion to vacate judgment and sentence, filed October 2, 2014. Based upon this review, the court makes the following:

FINDINGS OF FACT

1. In Clark County Cause No. 13-1-00678-2, the defendant, Alicia Olivares Castaneda, was originally charged by information with the crime of Theft in the First Degree, a class B felony. Based on an affidavit filed in support of the issuance of a summons, the court found probable cause to believe that the defendant and an accomplice stole \$8,345.00 in cash and food assistance from the Department of Social and Health Services. The crime was alleged to have been committed between May 1, 2009 and May 1, 2010. The defendant initially entered a plea of not guilty. Throughout these proceedings, the defendant requested and received the assistance of court appointed counsel, and a court appointed Spanish interpreter.

2. On July 25, 2013, the defendant appeared before the court for the purpose of entering a plea of guilty to a reduced charge. The State agreed to amend the information to charge one count of theft in the second degree. Although the title of the count referenced "welfare fraud – 74.08.331," the charging language did not reference the elements of that crime or the statutory language of that section. The charging language alleged that the defendant "did wrongfully obtain or exert unauthorized control over the property or services of another, to wit: United States currency of a value exceeding \$750, with intent to deprive the Department of Social and Health Services, the

true owner thereof, of such property or services; contrary to Revised Code of Washington 9A.56.020(1)(a) and 9A.56.040(1)(a) and/or was an accomplice to said crime pursuant to RCW 9A.08.020.”

3. Prior to entering a plea, the defendant met with her attorney and an interpreter to review the plea form. The interpreter, Carmen Vernier, verified that the defendant understood Spanish, and the interpreter had interpreted the entire document for the defendant. At a colloquy during the plea, the defendant acknowledged that the interpreter had read the form to her, and that she understood everything that was read to her.

4. Olivares Castaneda entered a plea of guilty to the charge of theft in the second degree, as charged in the second amended information.

5. The plea statement in this case, paragraph 6(i), provided the following specific information to the defendant:

In considering the consequences of my guilty plea, I understand that ... (i) If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

Counsel for the defendant placed a handwritten asterisk next to this paragraph.

6. The defendant was assisted by her counsel and a Spanish interpreter during the plea process in court. She indicated both in the plea form and orally that she was making an admission of guilt freely and voluntarily. The court engaged in an extended colloquy with Olivares Castaneda concerning her understanding of her rights and the consequences of her decision to plead guilty. The court specifically reviewed the portion of the plea form that warned that the defendant could be deported following

conviction. Olivares Castaneda advised the court, through the interpreter, that she understood this was a consequence of her entering a plea to the felony charge. The court concluded that the plea was knowingly, intelligently and voluntarily made, and that there was a factual basis for the plea. The court accepted the plea, and immediately proceeded to sentencing, as requested by the parties.

7. The court accepted the recommendation of the parties concerning sentencing. The defendant was sentenced to 30 days of partial confinement on a work crew. The court entered judgment and sentence in Cause No. 13-1-00678-2 on July 25, 2013.

8. On July 25, 2014, Olivares Castaneda filed a motion to vacate judgment and sentence (CrR 7.8). The basis for relief alleged in the motion is that the defendant did not receive the effective assistance of prior counsel. The specific concerns addressed by the defendant include her contentions that counsel (a) did not assure that she understood the plea process and the immigration consequences of pleading guilty to the reduced charge, and (b) did not obtain a plea offer from the prosecutor that would insulate her from those consequences. The only relief requested is vacation of the judgment and sentence, although it is implied that the defendant also wishes to withdraw her guilty plea and proceed to trial on the original charges.

Based upon the foregoing Findings of Fact, the court enters the following
Conclusions of Law:

CONCLUSIONS OF LAW

1. The defendant's motion to vacate the judgment and sentence is made pursuant to CrR 7.8.

2. The motion is not time barred by RCW 10.73.090. The motion is also timely filed, pursuant to the requirements of CrR 7.8 (b).

3. The defendant has not made a substantial showing that she is entitled to relief from the judgment and sentence entered on July 25, 2013, due to ineffective assistance of counsel. The objective evidence in the record establishes that Olivares Castaneda was fully advised of the consequences of her plea, and the nature of the plea and sentencing process, both orally and in writing. Through certified interpreters, she indicated to her attorney and the court that she understood the process, and the potential immigration consequences of her actions. There is no evidence in the record that the defendant was not legally competent at any point during this case.

4. Resolution of this motion does not require a factual hearing. The factual and legal basis for accepting the defendant's plea is in the record. The plea forms reviewed by the defendant, and her colloquy with the court before the plea was accepted, is also contained in the record. The defendant's declaration that she subjectively felt or believed something other than what she affirmatively stated to counsel, the interpreter and the court does not create a factual issue that is relevant to the court's decision.

Based on the foregoing Findings of Fact and Conclusions of Law, now, therefore, it is hereby ORDERED, ADJUDGED and DECREED as follows:

ORDER

1. The defendant's motion for relief from judgment, denominated a motion to vacate judgment and sentence (CrR 7.8), filed July 24, 2014, is transferred to the Court of Appeals, Division II, for consideration as a personal restraint petition, as required by CrR 7.8 (b)(2).

2. The court shall mail a copy of this order to the defendant; to the defendant's current counsel, Nicole Dalton; to the defendant's former counsel, Gerald Wear and to deputy prosecuting attorney Rachael Probstfeld.

Dated this 3rd day of October, 2014.

A handwritten signature in black ink, appearing to read "R. A. Lewis", is written over a horizontal line.

Judge Robert A. Lewis

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,)	
	)	NO. 13-1-00678-2
Plaintiff,)	
vs.	)	DECLARATION OF
	)	SERVICE
ALICIA OLIVARES CASTANEDA,)	
)	
Defendant.)	

I declare under penalty of perjury under the laws of the State of Washington that on this date I sent by regular U.S. Mail a copy of the Findings of Fact and Conclusions of Law, and Order Transferring Motion to Vacate Judgment and Sentence Pursuant to CrR 7.8 to Court of Appeals, Division II, dated October 3, 2014, to the parties addressed below:


Nicole Dalton
Attorney at Law
100 E. 13th Street, #108
Vancouver, WA 98660

Alicia Castaneda
8917 NE 15th Avenue, Apt. I-97
Vancouver, WA 98665

Gerald Wear
Attorney at Law
207 E 19th Street
Vancouver, WA 98663

Rachael Probstfeld
Deputy Prosecuting Attorney
PO Box 5000
Vancouver, WA 98666-5000
(via courier)

DATED this 3rd day of October, 2014.



Judicial Assistant, Dept. 9

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FILED

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Scott G. Weber, Clerk, Clark Co.

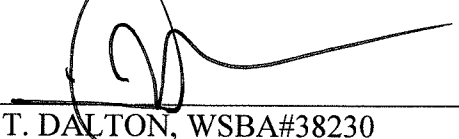
IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR CLARK COUNTY

STATE OF WASHINGTON,)	Case No. 13-1-00678-2
)	
Plaintiff,	)	MOTION TO VACATE
	)	JUDGMENT AND SENTENCE
v.	)	CrR 7.8
)	
ALICIA OLIVARES CASTANEDA,)	
)	
Defendant.)	
)	

MOTION

The above-named defendant, by and through counsel, Nicole T. Dalton, respectfully moves for this court to vacate the judgment and sentence entered on or about July 25, 2013, in this case. This motion is based on CrR 7.8, the United States Constitution, the defendant's Memorandum of Law in Support of this Motion to Vacate Judgment and Sentence and the Exhibits thereto, the authorities cited therein, the recording of plea proceedings (on file with the Superior Court and hereby incorporated by reference), and on the court file and record in this case.

Respectfully submitted this 24th day of July, 2014.



NICOLE T. DALTON, WSBA#38230
Attorney for Defendant

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CERTIFICATION

I hereby certify that on this 24th day of July, 2014, I delivered a copy of the foregoing
MOTION TO VACATE JUDGMENT AND SENTENCE

☐ by US mail, postage prepaid,
☒ by hand delivering the copy,
☐ by courier
☐ by facsimile

to the following person at the address listed below:

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver, WA 98666



☐ Nicole T. Dalton, WSBA#38230
☐ Tory M. Stewart
☒ Sabel Vazquez

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6 IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR CLARK COUNTY

7 STATE OF WASHINGTON,) Case No. 13-1-00678-2
8)
9 Plaintiff,) MEMORANDUM OF LAW IN
10 v.) SUPPORT OF MOTION TO
11 ALICIA OLIVARES CASTANEDA,) VACATE JUDGMENT AND
12 Defendant.) SENTENCE
13)

14 FACTS

15 Ms. Olivares-Castaneda (hereinafter “Ms. Olivares-Castaneda” or the Defendant)
16 is not a United States Citizen. Ms. Olivares-Castaneda entered the United States in 2001
17 and has not left the United States since then. In the case at hand, Ms. Olivares-Castaneda
18 entered a plea of guilty to Theft in the Second Degree, on July 25, 2013, on counsel’s
19 advice. Ms. Olivares-Castaneda learned, through advice of other counsel, subsequent to
20 resolution of this matter, that the conviction entered is grounds for deportation under
21 United States immigration law. The Petitioner has been in the United States for
22 approximately thirteen years and has four young children who reside in the State of
23 Washington and are United States citizens.

24
25 When initially charged, the court appointed counsel to represent Ms. Olivares
26 Castaneda in the proceedings on this matter (hereinafter “prior counsel”). Ms. Olivares

1 Castaneda speaks Spanish as her primary language and speaks very little English.
2 Additionally, the parents of Ms. Olivares Castaneda were native speakers of two distinct
3 indigenous languages and had a limited command of Spanish. Nonetheless, Spanish was
4 spoken in the home where Ms. Olivares Castaneda grew up, as well as some Mixteco.
5 Ms. Olivares-Castaneda understands Mixteco but does not really speak the language. She
6 received a very limited education in the Spanish language, and only attended school
7 through the sixth grade. Her ability to read and write in her own language is limited.

9 Ms. Olivares-Castaneda presents as a passive, agreeable and quiet individual. In
10 interacting with her beyond a superficial level, however, it appears that Ms. Olivares-
11 Castaneda has some problems with comprehension in her native language of Spanish
12 when dealing with matters beyond the very basic. *See attached* Declaration of Gabriel
13 Garcia-Murillo. On detailed examination or interaction with her in her own language, it
14 appears that Ms. Olivares-Castaneda may have some cognitive limitations. *Id.*

16 It does not appear that prior counsel asked any questions of Ms. Olivares-
17 Castaneda to evaluate her intellectual capacity and level of comprehension. Because of
18 the linguistic and cultural differences between prior counsel and client, it is likely that
19 prior counsel would have needed to rely on the interpreter to bring attention to any doubts
20 about her ability to comprehend and no interpreter raised any issue with prior counsel.
21 Her prior counsel no longer recalls who interpreted during office visits. Ms. Olivares-
22 Castaneda indicates that when she would meet with prior counsel, the process went very
23 fast and the interpreter had to go because of having other things to do. The interpreter
24 also used words that Ms. Olivares-Castaneda did not understand.
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1 Ms. Olivares-Castaneda believes she met with prior counsel two or three times
2 prior to entering the guilty plea. Ms. Olivares-Castaneda indicates that she did not know
3 what a prosecutor was and during her meetings with prior counsel that was not explained.
4 Ms. Olivares-Castaneda indicates that she spent maybe an hour with prior counsel at each
5 meeting. She recalls that he told her "a lot of things" and would read things to her but
6 that there was a lot she didn't understand. Prior counsel told her they had made a mistake
7 and they were going to have to pay the consequences for that. Ms. Olivares-Castaneda
8 does not recall going over the discovery and does not believe that prior counsel showed
9 her the papers that constitute evidence of the alleged crime and did not ask her questions
10 about her knowledge or experience with those papers.
11

12 She indicates that she was told that a person would testify against her. Ms.
13 Olivares-Castaneda indicates that she was never given any explanation of what it meant
14 to be guilty of the offense. Ms. Olivares-Castaneda did not know what a trial was and
15 does not believe prior counsel ever indicated that she could fight the charges or told her
16 how she could do that. She recalls telling prior counsel that she didn't do anything and
17 she had a "clean heart" but she believes that prior counsel just indicated that she had to
18 "sign guilty." Ms. Olivares-Castaneda did not believe she had any choices in the matter,
19 but rather that she just had to do what her attorney said.
20

21 She indicates that she did not understand the concept of "intent" and it was not
22 explained to her that the state would have to prove that she acted intentionally. Ms.
23 Olivares-Castaneda indicates that she was never asked whether she knew or intended to
24 steal. In meeting with prior counsel, Ms. Olivares-Castaneda was not asked what she
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26

1 thought she was doing when she asked for the benefits (that were the subject of the
2 Welfare Fraud charge) or what she thought when she received the money.

3 Prior counsel did not specifically discuss the clear immigration consequences with
4 Ms. Olivares-Castaneda. Ms. Olivares-Castaneda recalls that prior counsel told her that
5 “because of what happened, the immigration could pick you guys up, but they didn’t.”
6 She does not believe that prior counsel discussed anything more about immigration with
7 her. She does not believe that she was ever told that she would be subject to deportation
8 and likely deported if she pled guilty. Prior counsel did not warn Ms. Olivares-Castaneda
9 that a conviction of the charge definitely would have adverse immigration consequences
10 or that the conviction would cause her to become deportable.
11

12 Ms. Olivares-Castaneda would not have entered a plea to the charge had she
13 known that the conviction would lead to the consequence of her deportation from the
14 United States. Ms. Olivares-Castaneda was not specifically advised that the conviction
15 would require her deportation from the United States by either criminal defense counsel
16 or by the Court.
17

18 When she went through the plea petition with prior counsel, Ms. Olivares-
19 Castaneda indicates that prior counsel would read it and the interpreter would then tell
20 her but sometimes the interpreter would just read it. She did not feel free to ask questions
21 and did not really understand the language regarding immigration in the plea petition.
22

23 During colloquy at the time of entry of plea, the judge made the following
24 statement and inquiry:

25 Court: If you are not a citizen of the United States you can be deported, excluded
26 from admission to the United States, or denied naturalization as a result of this
conviction. Do you understand that?

1 Ms. Olivares Castaneda answered "yes." *See attached* Transc. Plea Hearing 4. Ms.
2 Olivares Castaneda did not realize at the time of this exchange that she would become
3 deportable and the conviction would prevent her from having an avenue of relief from
4 deportation available.

5
6 Subsequent to the plea entry in this matter, Ms. Olivares-Castaneda received a
7 Notice to Appear for Removal Proceedings from the U.S. Department of Homeland
8 Security and Hearing on the matter has been scheduled. *See attached* Exhibit A.

9
10 **ARGUMENTS**

11 I. **This Motion is Timely**

12 This case is being submitted for consideration within the one year time limit on
13 collateral attack established by RCW 10.73.090.

14 II. **Washington Court Rule CrR 7.8 Allows the Court to Vacate the Judgment and**
15 **Sentence in this Case**

16 Pursuant to CrR 7.8(b), Ms. Olivares Castaneda has moved this court to vacate the
17 judgment and sentence entered against her. A court may relieve a party from a final
18 judgment on the following grounds:

19 On motion and upon such terms as are just, the court may
20 relieve a party from a final judgment, order, or proceeding for the
21 following reasons:

- 22 (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity
23 in obtaining a judgment or order;
24 (2) Newly discovered evidence which by due diligence could not have
25 been discovered in time to move for a new trial under rule 7.5;
26 (3) Fraud (whether heretofore denominated intrinsic or extrinsic),
misrepresentation, or other misconduct of an adverse party;
(4) The judgment is void; or
(5) Any other reason justifying relief from the operation of the
judgment.

1 CrR 7.8(b). The court may vacate a judgment under CrR 7.8(b)(5) under “extraordinary
2 circumstances not covered by any other section of the rule.” *State v. Olivera-Avila*, 89
3 Wn. App 313, 319, 949 P.2d 824 (1997) (citing *State v. Brand*, 120 Wn.2d 365, 369, 842
4 P.2d 470 (1992)). These circumstances must relate to fundamental, substantial
5 irregularities in the court’s proceedings or to irregularities extraneous to the court’s
6 action.” *Olivera-Avila*, 89 Wn. App at 319 (citations omitted).

8 Relief will be granted if the Petitioner establishes actual and substantial prejudice
9 resulting from a violation of his or her constitutional rights or a fundamental error of law.
10 *In the Matter of the Personal Restraint of Brett*, 142 Wn.2d 868, 16 P.3d 601 (internal
11 cites omitted). Ineffective assistance of counsel constitutes a violation of a defendant’s
12 constitutional Sixth Amendment right and results in a manifest injustice warranting plea
13 withdrawal. *Id.* at 674; *see also State v. Jamison*, 105 Wn. App. 572, 590, 20 P.3d 1010,
14 *review denied*, 144 Wn.2d 1018 (2001); *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d
15 699 (1974); *State v. Martinez*, 161 Wn. App. 436, 440-441, 253 P.3d 445 (2011)
16 (Ineffective assistance of counsel justifies relief under CrR 7.8(b)(5)).

18 III. Ineffective Assistance of Counsel Impermissibly Violated Ms. Olivares-
19 Castaneda’s Constitutional Rights under Strickland v. Washington

20 An accused person is constitutionally guaranteed reasonably effective
21 representation by counsel. U.S. Const. Amend. 6; *In re Brett*, 142 Wn.2d at 674;
22 *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
23 The purpose of the requirement for effective assistance of counsel is to ensure a fair and
24 impartial trial.” *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Denial
25 of the constitutional right to effective assistance of counsel constitutes a fundamental and
26

1 substantial irregularity in the proceedings that warrants redress pursuant to CrR 7.8.

2 *State v. Martinez*, 161 Wn. App. at 440-441 (2011).

3 A claim of ineffective assistance presents a mixed question of fact and law
4 reviewed *de novo*. *Martinez*, 161 Wn. App. at 441 (2011) (citing *State v. Sutherby*, 165
5 Wn.2d 870, 883, 204 P.3d 916 (2009)); *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d
6 at 226. A defendant possesses the right to effective assistance of counsel in criminal
7 proceedings. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052,
8 80 L. Ed. 2d 674 (1984)). Counsel is presumed effective. *Id.* (citing *State v. McFarland*,
9 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)).

10 To prove ineffective assistance of counsel, the Petitioner must show that: (1)
11 defense counsel's representation was deficient, falling below an objective standard of
12 reasonableness; and (2) the deficient performance prejudiced the defendant. *Id.* (citing
13 *Sutherby*, 165 Wn.2d at 883; *Strickland*, 466 U.S. at 687). The first prong is met by
14 showing that defense counsel's performance was not reasonably effective under
15 prevailing professional norms. The second prong is met by showing that, but for
16 counsel's errors, the result would have been different. *State v. McFarland*, 127 Wn.2d
17 322, 334-35, 899 P.2d 1251 (1995). "To demonstrate [prejudice], 'a defendant need not
18 show that counsel's deficient conduct more likely than not altered the outcome in the
19 case.'" *Strickland*, 466 U.S. at 693; *United States v. Kwan*, 407 F.3d 1005, 1017 (9th Cir.
20 2005). The burden of proof is a preponderance of the evidence. *Brett* 142 Wn.2d at 674;
21 *In re Personal Restraint of Cook*, 114 Wn.2d 802, 814, 792 P.2d 506 (1990).

22 The inquiry in determining whether counsel's performance was constitutionally
23 deficient is whether counsel's assistance was reasonable considering all of the
24

1 circumstances. *Brett*, 142 Wn. App. at 873 (citing *Strickland*, 466 U.S. at 689-90). To
2 provide constitutionally adequate assistance, “counsel must, at a minimum, *conduct a*
3 *reasonable investigation* enabling [counsel] to make informed decisions about how to
4 best represent [the] client.” *Id.* (citing *Strickland*, 466 U.S. at 689-90); *see also Hendricks*
5 *v. Vasquez*, 974 F.2d 1099, 1109 (9th Circuit) (1992) (vacating conviction); *U.S. v.*
6 *Burrows*, 872 F.2d 915, 918 (9th Cir.) (1989) (reversing conviction for failure to
7 investigate a mental defense); *Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir.)(1988).

9 Here, counsel’s failure to adequately assure that Ms. Olivares-Castaneda
10 understood her options and her ability to defend against the charges was unreasonable
11 and prevented counsel from making an informed decision about effective representation.
12 Additionally, counsel’s failure to inform Ms. Olivares-Castaneda that deportation with no
13 relief available would be a consequence of the plea; failure to offer alternatives in light of
14 that consequence was unreasonable. Reasonable criminal defense counsel would have
15 offered additional choices such as either: 1) attempting to negotiate the case to plea to a
16 lesser sentence which could convert the charge to a non-deportable offense under
17 immigration law or preserve avenues of relief; or, 2) explaining the trial process to an
18 extremely uninformed client and encouraging her to consider taking the case to trial. A
19 review of the facts of the case and the declaration submitted in conjunction with the plea
20 show that self-defense may well have been a plausible defense.

23 Had the deportation consequence been pointed out to the prosecutor along with
24 counsel’s willingness to go to trial, it is reasonable to expect that a more favorable offer
25 might have been obtained. *Padilla* has endorsed the concept that defense counsel and the
26 prosecutor should consider the deportation consequences of a plea at the time that the

1 plea is negotiated. 130 S. Ct. 1473 (2010). It would also have been reasonable for Ms.
2 Olivares-Castaneda to choose to fight the charge if a more favorable offer, without the
3 drastic immigration consequences, were not available. Instead, Ms. Olivares-Castaneda
4 felt she had no choice but to plead guilty to a charge that would cause her to be
5 deportable and make avenues of relief from deportation unavailable.
6

7 IV. Ms. Olivares-Castaneda was Convicted of a Crime that Makes Her Deportable
8 and Prevents her from being able to Seek Cancellation of Removal

9 Ms. Olivares-Castaneda was convicted of Theft in the Second Degree, Welfare
10 Fraud, in a Washington State court, a deportable offense for which cancellation of
11 removal is unavailable. The offense of Theft in the Second Degree, Welfare Fraud under
12 Washington is a crime involving moral turpitude because intent to defraud is an element
13 of the offense. *See i.e. In re Cortez*, 25 I. & N. Dec. 301, 306 (BIA 2010). Ms. Olivares-
14 Castaneda is therefore ineligible for cancellation. *See* 8 U.S.C. § 1229b(b)(1)(C); 8
15 U.S.C. § 1227(a)(2)(A)(i); 8 U.S.C. § 1101(a)(43)(g).¹
16

17 The specification of the offense of conviction as a “Fraud” offense clearly
18 classifies the conviction as a “crime involving moral turpitude” and bars the defendant
19 from eligibility for asylum of withholding of removal. 8 U.S.C. § 1227(a)(2)(A)(i)
20 “provides for the removal of “any alien who -- (I) is convicted of a crime involving moral
21

22 ¹ *In re Pers. Restraint of Ramos*, 326 P.3d 826, 831 (2014) (“The Immigration and Nationality Act (INA)
23 does not define the terms “fraud” or “deceit.” 8 U.S.C. § 1101. But several federal circuits offer guidance.
24 When interpreting the meaning of 8 U.S.C. § 1101(a)(43)(M)(i), the court in *Valansi v. Ashcroft*, 278 F.3d
25 203, 209 (3d Cir. 2002) held the terms should be construed in the commonly accepted legal sense. Fraud
26 means a false representation of a material fact made with knowledge of its falsity and with intent to
deceive. *Valansi*, 278 F.3d at 209-10. The deceived party must believe and act on the misrepresentation to
his disadvantage. *Valansi*, 278 F.3d at 209-10. Likewise, the term “deceit” is commonly perceived and has
been defined as the act of intentionally giving a false impression. *Valansi*, 278 F.3d at 209-10; *see also*
Patel v. Mukasey, 526 F.3d 800 (5th Cir. 2008) (“fraud” and “deceit” retained their commonly understood
legal meanings).”

1 turpitude . . . and (II) is convicted of a crime for which a sentence of one year or longer
2 may be imposed." *Rusz v. Ashcroft*, 376 F.3d 1182, 1184 (9th Cir. 2004).

3 Were it not for the present conviction, based on her circumstances, Ms. Olivares
4 Castaneda likely would be eligible for Cancellation of Removal for Certain Non-
5 Permanent Residents statute, 8 U.S.C. § 1229b, which provides as follows:
6

7 (b) Cancellation of removal and adjustment of status for certain nonpermanent
8 residents.

9 (1) In general. The Attorney General may cancel removal of, and adjust to the status
10 of an alien lawfully admitted for permanent residence, an alien who is inadmissible or
11 deportable from the United States if the alien--

12 (A) has been physically present in the United States for a continuous period of not
13 less than 10 years immediately preceding the date of such application;

14 (B) has been a person of good moral character during such period;

15 (C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or
16 237(a)(3) [8 USCS § 1182(a)(2), 1227(a)(2), or 1227(a)(3)], subject to paragraph (5);
17 and

18 (D) establishes that removal would result in exceptional and extremely unusual
19 hardship to the alien's spouse, parent, or child, who is a citizen of the United States or
20 an alien lawfully admitted for permanent residence.

21 Ms. Olivares-Castaneda's conviction falls under 8 U.S.C. 1227(a)(2), as discussed above,
22 and bars her from cancellation of removal. A successful application for cancellation of
23 removal would result in an award of legal permanent resident status to Ms. Olivares-
24 Castaneda. At this point, while the conviction here stands, immigration authorities have
25 no administrative discretion to do anything but deport Ms. Olivares-Castaneda from the
26 United States. At the time of plea, it was very likely and foreseeable that Ms. Olivares-
Castaneda would be referred to deportation proceedings and, in fact, she was placed into
deportation proceedings on May 19, 2014. *See attached* Exhibit A.

Under *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482-1483, 176 L.Ed. 2d 284 (2010),
prior counsel was ineffective in this case because he failed to advise the Ms. Olivares

1 Castaneda of the direct consequence of her plea and as such, the plea was not knowing
2 and voluntary and is void as a matter of law.

3 V. Padilla and its Progeny Require Counsel to Provide Adequate and Correct
4 Immigration Advice Regarding the Consequences of Plea

5 In *Padilla v. Kentucky*, the United States Supreme Court established that as a
6 constitutional matter of effective assistance, counsel must advise her client regarding the
7 risk of deportation. *Padilla*, 130 S. Ct. at 1482 (U.S. 2010). The court explained that it
8 has “never applied a distinction between direct and collateral consequences to define the
9 scope of constitutionally reasonable professional assistance” as required under *Strickland*.
10 *Id.* at 1481. The *Padilla* court elaborated on the rule: “when the deportation
11 consequence is truly clear, as it was in this case, the duty to give correct advice is equally
12 clear.” *Id.* at 1483.

14 Substantial resources exist in the State of Washington to help criminal defense
15 practitioners determine immigration consequences, including but not limited to
16 consulting with immigration attorneys and the Washington Defender Association’s
17 (hereinafter “WDA”) Immigration Project. The WDA has published for free on the
18 internet, before and during the time of the entry of plea in this case, guidelines for
19 criminal defense attorneys to avoid negative immigration consequences for noncitizens.
20 See <http://www.defensenet.org/immigration-project/immigration-resources>. Specifically,
21 a 2009 edition of an easy reference guide to deportation consequences was readily
22 available to the public, through the WDA, showing deportation as a likely consequence
23 of this sort of conviction. See [http://www.defensenet.org/immigration-](http://www.defensenet.org/immigration-project/immigration-resources/RCW_Immigration_Chart-1.pdf)
24 [project/immigration-resources/RCW_Immigration_Chart-1.pdf](http://www.defensenet.org/immigration-project/immigration-resources/RCW_Immigration_Chart-1.pdf), p. 17.
26

1 The *Padilla* Court observed that the extremely harsh consequence of deportation
2 justified the requirement that counsel adequately advise the client of such consequences
3 and noted that resources are generally available to defense attorneys:
4

5 We too have previously recognized that “ '[p]reserving the client's right to remain
6 in the United States may be more important to the client than any potential jail
7 sentence.' ” *St. Cyr*, 533 U.S., at 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (quoting
8 3 Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999)). Likewise, we
9 have recognized that “preserving the possibility of” discretionary relief from
10 deportation under § 212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress
11 in 1996, “would have been one of the principal benefits sought by defendants
12 deciding whether to accept a plea offer or instead to proceed to trial.” *St. Cyr*, 533
13 U.S., at 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347. **We expected that counsel who
14 were unaware of the discretionary relief measures would “follo[w] the advice
15 of numerous practice guides” to advise themselves of the importance of this
16 particular form of discretionary relief.** *Ibid.*, n. 50.

17 (emphasis added). *Padilla*, 130 S. Ct. at 1482-1483 (2010). To prove ineffective
18 assistance of counsel, Ms. Olivares-Castaneda must show that (1) defense counsel's
19 representation was deficient, falling below an objective standard of reasonableness, and
20 (2) the deficient performance prejudiced the defendant. *State v. Martinez*, 161 Wn. App.
21 436, 441 (Wash. Ct. App. 2011) (citing *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d
22 916 (2009); and *Strickland*, 466 U.S. at 687). The above language from *Padilla* makes it
23 clear that counsel’s performance here was deficient and did indeed fall below an
24 objective standard of reasonableness.

25 a. Failure to Advise of Certain Immigration Consequences of Plea and
26 Existing Alternative Constitutes Ineffective Assistance of Counsel

27 In *State v. Sandoval*, the Washington Supreme Court considered the question of
28 whether a noncitizen criminal defendant is denied the right to effective assistance of
29 counsel where the defense attorney advised him to plead guilty. 171 Wn.2d 163, 167
30 (2011). There, the court found that an immigrant who was facing 78 to 102 months was

1 acting reasonably in moving to set aside his prior conviction and sentence of 6 to 12
2 months due to ineffective assistance of counsel.

3 In *Sandoval*, similar to the circumstances of the case at hand, the defendant's
4 attorney had not adequately advised the defendant of the effect of the plea on his
5 immigration status. The attorney indicated:
6

7 "I told Mr. Sandoval that he should accept the State's plea offer because he would
8 not be immediately deported and that he would then have sufficient time to retain
9 proper immigration counsel to ameliorate any potential immigration consequences
of his guilty plea."

10 *State v. Sandoval*, 171 Wn.2d 163, 167 (2011). As in the present case, counsel in
11 *Sandoval* had provided equivocal advice that confused and failed to communicate the
12 clear consequences of the decision to plead guilty:

13 First, defense counsel's mitigation advice may not be couched with so much
14 certainty that it negates the effect of the warnings required under Padilla. The
15 required advice about immigration consequences would be a useless formality if,
16 in the next breath, counsel could give the noncitizen defendant the impression that
17 he or she should disregard what counsel just said about the risk of immigration
18 consequences. Under Padilla, counsel can provide mitigation advice. However,
19 counsel may not, as Sandoval's counsel did, assure the defendant that he or she
20 certainly "would not" be deported when the offense is in fact deportable. That
Sandoval was subjected to deportation proceedings several months later, and not
"immediately" as his counsel promised, makes no difference. Sandoval's counsel's
advice impermissibly left Sandoval the impression that deportation was a remote
possibility.

21 *Sandoval*, 171 Wn.2d at 173 (2011). Ultimately, the *Sandoval* Court held that:

22 "the performance of Sandoval's counsel during the plea process 'fell below an
23 objective standard of reasonableness,' *Strickland*, 466 U.S. at 688, and thus was
24 constitutionally incompetent because his advice regarding the immigration
consequences of Sandoval's plea impermissibly downplayed the risks."

25 *Sandoval*, 171 Wn.2d at 174 .
26

1 Here, counsel's efforts to inform Ms. Olivares-Castaneda of the immigration
2 consequences of his decision fell substantially below those in the *Sandoval* case. Counsel
3 did not directly discuss immigration issues with Ms. Olivares-Castaneda in advance of
4 going through the plea paperwork, other than making one confusing and equivocal
5 statement that she recalls as "because of what happened, the immigration could pick you
6 guys up, but they didn't."

8 Ms. Olivares-Castaneda had no idea that the plea would be very likely to cause
9 deportation proceedings against her and would make her ineligible for cancellation of
10 removal. Additionally, the consequences of a conviction after trial in this case would
11 have been much less severe than those in *Sandoval*, so a decision to take the case to trial
12 rather than pleading guilty would have been more than reasonable given the extremely
13 harsh consequences of the plea and conviction.

15 Subsequent to the decision in *Sandoval*, the Division Three Court of Appeals also
16 reversed a conviction and allowed plea withdrawal. *State v. Martinez*, 161 Wn. App.
17 436, 440 (2011). There, the court of appeals found that the lower court had abused its
18 discretion in denying Mr. Martinez' CrR7.8(b)(5) motion for relief from judgment based
19 on ineffective assistance of counsel because of a failure to warn of deportation
20 consequences. *Id.* The lower court had denied the motion, reasoning Mr. Martinez
21 understood the immigration consequences of his plea based on the court's colloquy and
22 his guilty plea statement. *Id.*

24 Mr. Martinez asserted that the court and his counsel failed to inform him his plea
25 could have immigration consequences or, alternatively, he was incorrectly advised there
26 were only "mere grounds for deportation." *State v. Martinez*, 161 Wn. App. 436, 440

1 (2011). There, counsel had “no independent recollection” of what he had told Mr.
2 Martinez regarding immigration consequences but admitted he knew “very little about
3 immigration law.” The *Martinez* court found that the defendant had satisfied the
4 prejudice prong, as required in *Sandoval*:

6 “In satisfying the prejudice prong, a defendant challenging a guilty plea must
7 show that there is a reasonable probability that, but for counsel's errors, he would
8 not have pleaded guilty and would have insisted on going to trial.” *Riley*, 122
9 Wn.2d at 780-81 (citing *Hill*, 474 U.S. 52); accord *In re Pers. Restraint of*
10 *Elmore*, 162 Wn.2d 236, 254, 172 P.3d 335 (2007); *State v. Oseguera Acevedo*,
11 137 Wn.2d 179, 198-99, 970 P.2d 299 (1999). A “reasonable probability” exists if
the defendant “convince[s] the court that a decision to reject the plea bargain
would have been rational under the circumstances.” *Padilla*, 130 S. Ct. at 1485.
This standard of proof is “somewhat lower” than the common “preponderance of
the evidence” standard. *Strickland*, 466 U.S. at 694.

12 *State v. Sandoval*, 171 Wn.2d 163, 174-175 (2011). In both *Sandoval* and *Martinez*, the
13 prejudice prong was met where the defendants would have refused a favorable plea offer
14 had they known that deportation would be a consequence. *State v. Martinez*, 161 Wn.
15 App. 436, 443 (2011).

17 The language in both cases is a strong indicator that the decision to plead guilty or
18 go to trial is the immigrant’s choice and that the choice cannot be trumped by a reviewing
19 court if the defendant is acting rationally in choosing to attempt to vacate his conviction.
20 Ms. Olivares-Castaneda was linguistically and culturally marginalized and did not have
21 any personal experience that would inform her of the option of going to trial and her
22 counsel failed to explain and advise her that the option was available.

24 Ms. Olivares-Castaneda has also shown prejudice because, had she known of the
25 deportation consequence and had she known the option of trial was available, she would
26 not have accepted the offer, and would have chosen instead to proceed to trial. The risk

1 of going to trial in the instant case is much lower and the choice would clearly be rational
2 in light of the risks of trial faced in *Martinez* and *Sandoval* where the court found it
3 would have been rational to proceed to trial. Ms. Olivares-Castaneda was prejudiced by
4 counsel's failure to advise her regarding immigration consequences and adequately
5 explain her options, including going to trial.
6

7 b. The Statutory Warnings In the Plea Petition and the Recital Given by the
8 Court Here Cannot Save Failure of Counsel to Give Adequate Advice

9 In *State v. Sandoval*, the plea agreement contained the following warning about
10 immigration consequences:

11 "If I am not a citizen of the United States, a plea of guilty to an offense punishable
12 as a crime under state law is grounds for deportation, exclusion from admission to
13 the United States, or denial of naturalization pursuant to the laws of the United
14 States."

15 *State v. Sandoval*, 171 Wn.2d at 167 (2011). The record also indicated that Mr. Sandoval
16 affirmed that his counsel had reviewed the entire plea statement with the defendant with
17 an interpreter's help. Despite this language in the petition, that was adequately reviewed
18 by counsel and interpreted into Spanish, the appeals court concluded that Mr. Sandoval
19 had received ineffective assistance of counsel.

20 The Washington Court of Appeals in *State v. Martinez* also reached the same
21 conclusion on the issue: "[T]he guilty plea statement warnings required by RCW
22 10.40.200(2) cannot save the advice that counsel gave." *State v. Martinez*, 161 Wn. App.
23 436, 442 (Wash. Ct. App. 2011) (citing *Sandoval*, 171 Wn.2d at 173, 171 Wn.2d at 173).
24 There, Mr. Martinez claimed that his counsel "solely discussed the *possibility* of
25 deportation" while his counsel could not "remember exactly how he advised Mr.
26 Martinez but admit[ted] he knew little about immigration law." *Id.* Applying *Sandoval*,

1 the court found counsel's performance was deficient. *Id.* The *Martinez* court specifically
2 cited the rule enunciated in *Sandoval*:

3 **“If the applicable immigration law ‘is truly clear’ that an offense is**
4 **deportable, the defense attorney must correctly advise the defendant that**
5 **pleading guilty to a particular charge would lead to deportation.** If ‘the law is
6 not succinct and straightforward,’ counsel must provide only a general warning
7 that ‘pending criminal charges may carry a risk of adverse immigration
consequences.’” *Sandoval*, 171 Wn.2d at 170 (citation omitted) (*quoting Padilla*
v. Kentucky, ___ U.S. ___, 130 S. Ct. 1473, 1483, 176 L. Ed. 2d 284 (2010)).

8 *State v. Martinez*, 161 Wn. App. at 441 (2011) (emphasis added). Despite the warnings
9 given in the plea petitions in both *Sandoval* and *Martinez*, the court found ineffective
10 assistance where neither counsel had specifically warned the defendant that they would
11 be subject to deportation as a direct consequence of the guilty pleas.

12
13 Ms. Olivares-Castaneda indicates she was not specifically told that pleading
14 guilty to the charge would lead to her deportation or that she would not be able to seek
15 cancellation of removal; both are clear consequences of the conviction in this case. Here,
16 the record does not show that Ms. Olivares-Castaneda’s counsel read or explained the
17 warning to her. Prior counsel does not specifically remember whether he told Ms.
18 Olivares Castaneda that the plea would cause her deportation and prevent her from being
19 able to claim relief from deportation. Although an interpreter was present, Ms. Olivares-
20 Castaneda’s Spanish language skills are limited and she has only a sixth grade education.
21 Further explanation by counsel would have been necessary for her to understand the
22 impact of the plea on her immigration status.

23
24 For a defendant's guilty plea to be deemed voluntary and valid, the defendant
25 must understand the sentencing consequences of his plea. *State v. Bisson*, 156 Wn.2d
26 507, 517, 130 P.3d 820 (2006) (quoting *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d

1 122 (1988); *State v. Turley*, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003)). To be valid, a
2 guilty plea must be voluntarily and intelligently made and with full knowledge that
3 certain rights are waived. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996).
4 Whether a plea is knowingly, intelligently, and voluntarily made is determined from a
5 totality of the circumstances. *Branch*, 129 Wn.2d at 642.
6

7 A guilty plea which is invalid due to the State's failure to adequately inform a
8 defendant of his rights constitutes actual prejudice. *In re Garcia*, 35 Wn. App. 837, 839,
9 670 P.2d 672 (1983). The *Garcia* court recognized that a signature on the plea petition
10 form normally satisfy the requirement of advisement of rights. *In re Garcia*, 35 Wn. App.
11 837, 839 (1983) (citing *State v. Chervenell*, 99 Wn.2d 309, 313 (1983)).
12

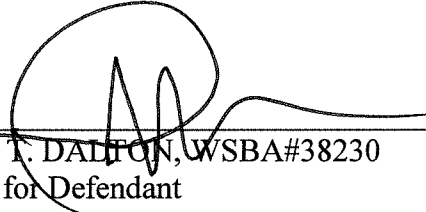
13 However, in *Garcia*, where the defendant did not read, write or understand the
14 English language, the court's failure to ask the defendant through the interpreter whether
15 the defendant had read through and understood the form constituted actual prejudice
16 because he was not adequately advised of his right to confront his accusers. *In re Garcia*,
17 35 Wn. App. at 839. Washington appellate courts have held that the immigration
18 warnings contained in the plea petition are not sufficient to satisfy the requirements of
19 *Padilla*, and the warnings given in the plea were not adequate to advise the defendant of
20 the certain immigration consequences of the conviction.
21

22 CONCLUSION

23 Ms. Olivares-Castaneda has a limited command of her own language, Spanish,
24 speaks no English, and has difficulties understanding complicated concepts. Prior
25 counsel was ineffective because he did not discover these difficulties, did not take time to
26 explain the right to a jury trial in a detailed way, and did not explain the specific and

1 certain immigration consequences that would attach to the conviction in this matter.
2 Instead, counsel gave equivocal and confusing advice about the impact of the conviction
3 on Ms. Olivares-Castaneda's immigration status. Ms. Olivares-Castaneda did not into
4 her plea knowingly or voluntarily. Counsel was ineffective and Ms. Olivares-Castaneda
5 was prejudiced thereby. Due to ineffective assistance of counsel, the guilty plea,
6 conviction, and judgment in this matter should be vacated.
7

8 RESPECTFULLY SUBMITTED this 24th day of July, 2014.

9
10
11 
12 _____
13 NICOLE T. DALTON, WSBA#38230
14 Attorney for Defendant
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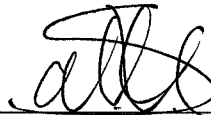
CERTIFICATION

I hereby certify that on this 24th day of July, 2013, I delivered a copy of the foregoing
MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE JUDGMENT
and supporting EXHIBITS and DECLARATIONS

☐ by US mail, postage prepaid,
☒ by hand delivering the copy,
☐ by courier
☐ by facsimile

to the following person at the address listed below:

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver, WA 98666



☐ Nicole T. Dalton, WSBA#38230
☐ Tory M. Stewart
☒ Sabel Vazquez

NOTICE OF HEARING IN REMOVAL PROCEEDINGS
IMMIGRATION COURT
1220 SW 3RD AVENUE, SUITE 500
PORTLAND, OR 97204

RE: OLIVARES-VAZQUEZ, ALICIA
FILE: A206-547-726

DATE: Jun 30, 2014

TO:

OLIVARES-VAZQUEZ, ALICIA
8917 NE 15TH AVE, APT 97
VANCOUVER, WA 98665

Please take notice that the above captioned case has been scheduled for a MASTER hearing before the Immigration Court on Oct 6, 2014 at 10:00 A.M. at:

1220 SW 3RD AVENUE, SUITE 500
PORTLAND, OR 97204

You may be represented in these proceedings, at no expense to the Government, by an attorney or other individual who is authorized and qualified to represent persons before an Immigration Court. Your hearing date has not been scheduled earlier than 10 days from the date of service of the Notice to Appear in order to permit you the opportunity to obtain an attorney or representative. If you wish to be represented, your attorney or representative must appear with you at the hearing prepared to proceed. You can request an earlier hearing in writing.

Failure to appear at your hearing except for exceptional circumstances may result in one or more of the following actions: (1) You may be taken into custody by the Department of Homeland Security and held for further action. OR (2) Your hearing may be held in your absence under section 240(b)(5) of the Immigration and Nationality Act. An order of removal will be entered against you if the Department of Homeland Security established by clear, unequivocal and convincing evidence that a) you or your attorney has been provided this notice and b) you are removable.

IF YOUR ADDRESS IS NOT LISTED ON THE NOTICE TO APPEAR, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT PORTLAND, OR THE ATTACHED FORM EOIR-33 WITH YOUR ADDRESS AND/OR TELEPHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS. EVERYTIME YOU CHANGE YOUR ADDRESS AND/OR TELEPHONE NUMBER, YOU MUST INFORM THE COURT OF YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER WITHIN 5 DAYS OF THE CHANGE ON THE ATTACHED FORM EOIR-33. ADDITIONAL FORMS EOIR-33 CAN BE OBTAINED FROM THE COURT WHERE YOU ARE SCHEDULED TO APPEAR. IN THE EVENT YOU ARE UNABLE TO OBTAIN A FORM EOIR-33, YOU MAY PROVIDE THE COURT IN WRITING WITH YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER BUT YOU MUST CLEARLY MARK THE ENVELOPE "CHANGE OF ADDRESS." CORRESPONDENCE FROM THE COURT, INCLUDING HEARING NOTICES, WILL BE SENT TO THE MOST RECENT ADDRESS YOU HAVE PROVIDED, AND WILL BE CONSIDERED SUFFICIENT NOTICE TO YOU AND THESE PROCEEDINGS CAN GO FORWARD IN YOUR ABSENCE.

A list of free legal service providers has been given to you. For information regarding the status of your case, call toll free 1-800-898-7180 or 240-314-1500. For information on Immigration Court procedures, please consult the Immigration Court Practice Manual, available at www.usdoj.gov/eoir.

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL ☒ (M) PERSONAL SERVICE (P)
TO: ☒ ALIEN ☐ ALIEN c/o Custodial Officer ☐ ALIEN's ATT/REP ☒ DHS
DATE: 6-30-14 BY: COURT STAFF BK V3
Attachments: ☒ EOIR-33 ☐ EOIR-28 ☐ Legal Services List ☐ Other

EXHIBIT A

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: 349901438

DOB: 06/16/1979

File No: 206 547 726

Event No: XPT1405000004

In the Matter of:

Respondent: ALICIA OLIVARES-VAZQUEZ AKA: OLIVARES-CASTANEDA, ALICIA

currently residing at:

8917 NE 15TH AVE, Apt 97, VANCOUVER, WASHINGTON, 98665

(360) 773-4713

(Number, street, city and ZIP code)

(Area code and phone number)

- ☐ 1. You are an arriving alien.
- ☒ 2. You are an alien present in the United States who has not been admitted or paroled.
- ☐ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of MEXICO and a citizen of MEXICO;
3. You arrived in the United States at or near UNKNOWN, on or about unknown date;
4. You were not then admitted or paroled after inspection by an Immigration Officer. OR At that time you arrived at a time or place other than as designated by the Attorney General.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

- ☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
- ☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8CFR 208.30(f)(2) ☐ 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:
1220 SW 3rd Avenue Suite 500 Portland OR 97204. EOIR Portland, OR

(Complete Address of Immigration Court, including Room Number, if any)

on To be set. at To be set. to show why you should not be removed from the United States based on the
(Date) (Time)

charge(s) set forth above.

TRINA LEDBETTER

(Signature and Title of Issuing Officer)

Date: May 19, 2014

Portland, OR

(City and State)

EXHIBIT A

See reverse for important information

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents, which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to one of the offices listed in 8 CFR 241.16(a). Specific addresses on locations for surrender can be obtained from your local DHS office or over the internet at <http://www.ice.gov/about/dro/contact.htm>. You must surrender within 30 days from the date the order becomes administratively final, unless you obtain an order from a Federal court, immigration court, or the Board of Immigration Appeals staying execution of the removal order. Immigration regulations at 8 CFR 241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Act.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to a 10-day period prior to appearing before an immigration judge.

Before:

(Signature of Respondent)

Date: _____

(Signature and Title of Immigration Officer)

Certificate of Service

This Notice To Appear was served on the respondent by me on 5/20/14, in the following manner and in compliance with section 239(a)(1)(F) of the Act.

- ☐ in person ☒ by certified mail, returned receipt requested ☐ by regular mail
- ☐ Attached is a credible fear worksheet.
- ☐ Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the _____ language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

(Signature of Respondent if Personally Served)

MICHAEL DEGRAFF

SPECIAL AGENT

(Signature and Title of Officer)

STATE OF WASHINGTON
DEPARTMENT OF HEALTH

CERTIFICATE OF LIVE BIRTH

CERTIFICATE NUMBER: 146-2006-018131

DATE ISSUED: 03/27/2007

GIVEN NAMES: MOISES*****

LAST NAME: VICTORIANO OLIVARES*****

DATE OF BIRTH: MARCH 28, 2006*****

FACILITY: SOUTHWEST WASHINGTON MEDICAL CENTER, CENTER CAMPUS

PLACE OF BIRTH: VANCOUVER, CLARK COUNTY, WASHINGTON

TIME OF BIRTH: 10:49 P.M.

SEX: MALE

MOTHER'S MAIDEN NAME: ALICIA OLIVARES VAZQUEZ

PLACE OF BIRTH: MEXICO

DATE OF BIRTH: 06/16/1979

FATHER'S NAME: FELIPE VICTORIANO CASTANEDA

PLACE OF BIRTH: MEXICO

DATE OF BIRTH: 04/08/1978

FILING DATE: 04/02/2006

FEE NUMBER: 6109169



EXHIBIT B-1

STATE OF WASHINGTON
DEPARTMENT OF HEALTH

CERTIFICATE OF LIVE BIRTH

CERTIFICATE NUMBER: T46-2002-045606

DATE ISSUED: 03/29/2007

GIVEN NAMES: ISRAEL*****

LAST NAME: VICTORIANO OLIVARES*****

DATE OF BIRTH: AUGUST 05, 2002*****

FACILITY: SOUTHWEST WASHINGTON MEDICAL CENTER, CENTER CAMPUS

PLACE OF BIRTH: VANCOUVER, CLARK COUNTY, WASHINGTON

TIME OF BIRTH: 04:26 P.M.

SEX: MALE

MOTHER'S MAIDEN NAME: ALICIA O. VAZQUEZ

PLACE OF BIRTH: MEXICO

DATE OF BIRTH: 06/16/1979

FATHER'S NAME: FELIPE V. CASTANEDA

PLACE OF BIRTH: MEXICO

DATE OF BIRTH: 04/03/1973

FILING DATE: 03/12/2002

FEE NUMBER: 6109303



EXHIBIT B-2

STATE OF WASHINGTON
DEPARTMENT OF HEALTH

CERTIFICATE OF LIVE BIRTH

CERTIFICATE NUMBER: 146-2009-012358

DATE ISSUED: 04/09/2009

GIVEN NAMES: RUTH

EAST NAME: VICTORIANO-OLIVARES

DATE OF BIRTH: FEBRUARY 27, 2009

FACILITY: LEGACY AT SALMON CREEK

PLACE OF BIRTH: VANCOUVER, CLARK COUNTY, WASHINGTON

TIME OF BIRTH: 09:00 A.M.

SEX: FEMALE

MOTHER'S MARRIAGE NAME: ALICIA OLIVARES-VASQUEZ

PLACE OF BIRTH: MEXICO

DATE OF BIRTH: 06/16/1979

FATHER'S NAME: FELIPE VICTORIANO-CASTANEDA

PLACE OF BIRTH: MEXICO

DATE OF BIRTH: 04/06/1978

FILING DATE: 03/04/2009

FEE NUMBER: 6241366



EXHIBIT B-3

Clinical Summary for Janet Victoriano Olivares

Date of Encounter: 06/05/2014 09:30 AM

Reason for today's visit and reported symptoms

Office Visit-Established Patient/MA intake

Medical problems addressed today

- Delayed speech
- Cerumen impaction

Medications

Ordered/Changed Medications during today's visit

- Debrox 6.5% Solution 1 (one) Solution Otic instil 5-10 drops in right ear canal leave in for 20 mins BID
Date Started: 06/05/2014

Notes: May irrigate ears with lukewarm water

Active Medication List

- Debrox 6.5% Solution 1 (one) Solution Otic instil 5-10 drops in right ear canal leave in for 20 mins BID Notes: May irrigate ears with lukewarm water

Allergy

- No Known Drug Allergies

Vital Signs

Temp.: 97.9 °F (Tympanic) Pulse: 115 (Regular) P. OX: 99% (Room air)

Weight: 37 lb, 8 oz Height: 38.6 in

Body Surface Area: 0.68 m² Body Mass Index: 17.7 kg/m²

Pain level: 0/10

Laboratory tests ordered today

**No lab tests were ordered today.

Assessment & Plan

Delayed speech

Current Plans:

- Referred to Audiology, Referral, (Undefined)
- Referred to Speech/Language, Referral, (Undefined)

Cerumen impaction

Current Plans:

- Started Debrox 6.5%, 1 (one) Solution instil 5-10 drops in right ear canal leave in for 20 mins BID, 1 Bottle, 2 days starting 06/05/2014, No Refill.

EXHIBIT B - 4

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR CLARK COUNTY


STATE OF WASHINGTON,)	Case No. 13-1-00678-2
)	
Plaintiff,	)	DECLARATION OF
	)	TRANSCRIPTIONIST
v.)	
)	
ALICIA OLIVARES CASTANEDA,)	
)	
Defendant.)	
)	

I, Teresa Buhman, hereby declare the following:

I was provided with a copy of the video recording of entry of plea proceedings in the above-noted matter. I am an experienced and capable transcriptionist. I reviewed the aforementioned recording in its entirety and accurately and completely transcribed the same to the best of my ability in the attached eight-page transcript.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED this 24 day of July, 2014.


Teresa Buhman

1 RL: Okay, this is Castanedas.

2 Clerk: Yes. Item Number 8.

3 RL: Interpreter, identify yourself for the record.

4 CV: My name is Carmen Vernier, Court Certified Interpreter.

5 RL: Previously sworn in the Court?

6 CV: Yes Your Honor.

7 GW: We received a copy of the amended charge of theft in the 2nd degree. My client
8 had it read to her and understands it.

9 RL: Are you Alicia Olivares-Castaneda?

10 AC: Yes.

11 RL: Says here you're 34 years old and your date of birth is June 16, 1979. Is that
12 correct?

13 AC: Yes.

14 RL: You went through the 6th grade in Mexico. Can you read and write the English
15 language?

16 AC: No.

17 RL: I've been handed this statement of a plea of guilty. Did someone read this form
18 to you in your native language?

19 AC: Uh huh.

20 RL: You have to use something other than uh huh and uh uh.

21 GW: Yes and no.

22 AC: Yes.

EXHIBIT C

1 RL: Did you understand everything that they read to you?

2 AC: Yes.

3 RL: Have you had enough time to talk to your attorney about how you want to
4 proceed?

5 AC: Yes.

6 RL: And do you have any questions about what we're doing?

7 AC: No.

8 RL: Is this your signature?

9 AC: Yes.

10 RL: The Second Amended Information charges you with theft in the 2nd degree,
11 welfare fraud. To convict you of that crime, the State would have to prove that between
12 May 1, 2009 and May 1, 2010 in the State of Washington, you wrongfully obtained or
13 exerted unauthorized control of the property or services of another at the United States
14 currency of a value exceeding \$750.00 with intent to deprive the Department of Social
15 and Health Services, the true owner thereof of such property or services, or that you
16 were an accomplice of such crime. Theft in the 2nd degree is a Class C Felony. It
17 carries a maximum penalty of 5 years in prison and a \$10,000.00 fine. I'm advised that
18 your offender score is zero, and that your standard range of sentencing is 0 to 60 days
19 of actual confinement. Do you understand the crime charge, the maximum penalty and
20 the standard sentencing range?

21 AC: Yes.

22 RL: Paragraph 5 of the form advises you of important rights that you give up by

EXHIBIT C

1 pleading guilty. You have the right to a speedy and public trial by an impartial jury.

2 You can remain silent both before and during the trial. You have the right to testify if

3 you choose to and you have a right to choose not to testify at your trial. At a trial you

4 have a right to hear and question witnesses who testify against you. And you have a

5 right to present your own witnesses and those witnesses can be made to appear at no

6 expense to you. You're presumed to be innocent unless the State proves the charge

7 beyond a reasonable doubt. And if you lose at a trial you can appeal. Do you

8 understand these trial rights?

9 AC: Yes.

10 RL: Do you have any questions about them?

11 AC: No.

12 RL: Do you understand that by pleading guilty you give up these rights?

13 AC: Yes.

14 RL: The prosecutor's going to make a recommendation, did you review that with your
15 attorney?

16 AC: Yes.

17 RL: The prosecutor agreed to amend the information to charge the crime your
18 pleading guilty to. They are going to recommend 30 days, and they recommend that be
19 served on partial confinement, work crew. Various legal financial obligation would be
20 imposed, including restitution to be set. And it says here you are stipulating or agreed
21 to full restitution. I assume that means even if it exceeds the jurisdictional amount of
22 theft in the 2nd degree, you would agree to make restitution for the excess amount.

EXHIBIT C

1 GW: We - we are agreeing to just that. We haven't gotten a figure yet, uh, her
2 husband who was charged, has already plead uh said that there was a number that had
3 surprised him, so we're not agreeing to a specific figure, but in terms of agreeing to over
4 uh \$750 certainly we are.

5 RL: Alright. Do you understand the prosecutor's recommendation?

6 AC: Yes.

7 RL: And do you understand that at sentencing I'm not bound by anyone's
8 recommendation? I can give you any legal sentence no matter what anyone
9 recommends. Do you understand that?

10 AC: Yes.

11 RL: If you are not a citizen of the United States you can be deported, excluded from
12 admission to the United States, or denied naturalization as a result of this conviction.
13 Do you understand that?

14 AC: Yes.

15 RL: After your conviction you may not possess, own or have under your control any
16 firearm, and under Federal Law any firearm or ammunition, unless your right to do so is
17 restored by the Superior Court in Washington State where you live, or the Superior
18 Court where your convicted, and by a Federal Court if required. If you have a
19 concealed pistol license you must immediately surrender it. Do you understand that?

20 AC: Yes.

21 RL: You also lose the right vote. It could be a crime for you to vote unless that right
22 is restored. Do you understand that?

EXHIBIT C

1 AC: Yes.

2 RL: While you're in custody you cannot receive government assistance, you have to
3 give a biological sample, pay a DNA collection fee. As a first time offender you can
4 receive up to 90 days confinement and up to 2 years community custody on the first
5 offender option although that's not being suggested here. Do you have any questions
6 about what I've told you so far?

7 AC: No.

8 RL: Now with everything we've reviewed in court then and everything that was in the
9 form that you handed up, what is your plea to Count 1 of the Second Amended
10 Information charging you with theft in the 2nd degree, welfare fraud, guilty or not guilty?

11 AC: Guilty.

12 RL: Are you making this plea freely and voluntarily?

13 AC: Yes.

14 RL: Has anyone threatened to harm you or any other person to cause you to plead?

15 AC: No.

16 RL: Did anyone promise you anything to get you to plead other than the promises
17 written in this statement?

18 AC: No.

19 RL: Paragraph 11 says this is my statement in Clark County, Washington between
20 May 1, 2009 and May 1, 2010 I admit to wrongfully obtaining or exerting unauthorized
21 control over the property U.S. currency over \$750 in value, with intent to deprive
22 Washington State Department of Social and Health Services of such property. Is that

EXHIBIT C

1 your statement?

2 AC: Yes.

3 RL: I find then that your plea is knowingly, intelligently and voluntarily made under the
4 factual basis for it. I will accept the plea and find you guilty of the crime charged in the
5 Second Amended Information. Do you wish to proceed to sentencing?

6 GW: Yes sir.

7 EC: Yes Your Honor.

8 RL: Go ahead.

9 EC: The State's recommendation is for a total sentence of 30 days. We are asking
10 that that be served on work crew. There is no community custody um in association
11 with this charge. We are asking for standard conditions, fines and fees. Um there is no
12 victim notification required in this case either, and just for the Court's information, um an
13 initial figure appears to be in excess of \$8,500.00 worth of cash and food assistance um
14 alleged to have been, well that was obtained by fraud, um and so that's at least a
15 baseline understanding of restitution, but we don't have the final number, not yet.

16 RL: Alright, and is there any credit for time served?

17 GW: No.

18 EC: No none.

19 RL: Okay, counsel?

20 GW: Thank you Your Honor. Uh the figure that has been provided in the initial police
21 reports as was indicated by the State was somewhat in excess of \$8,000.00. I have um
22 provided that information, that figure to my client so she has a general idea of what she

EXHIBIT C

1 and he husband may be looking at as payback. I think the payback process has
2 already begun suddenly. She doesn't have any prior record. Her husband plead to the
3 same charge uh a while back, he was given 30 days on work crew. It concerned me
4 that uh if they get work crew together it would be an issue concerning taking care of
5 children. She assures me that that issue has been dealt with. Uh we would ask the
6 Court to follow the recommendation and allow her the opportunity to do the 30 days on
7 work crew, substantial financial obligation that she and her husband are gonna be uh
8 severally and jointly responsible for and uh the sooner she gets to, gets to work on that
9 I think the better off. Uh I think it's a reasonable recommendation, in light of everything,
10 I have some concerns about her, I can't speak to her husband, but her underlying
11 concerns of her obligation under the welfare regulations, but uh clearly what she did
12 was in violation.

13 RL: Alright. Is there anything you want to say before I sentence you?

14 AC: No.

15 RL: And if I were to sentence you to work crew would you be in a position to do it as
16 required?

17 AC: yes.

18 RL: I hope you understand it's an alternative to jail, so if you don't show up for it,
19 don't do it in the way you're supposed to do it, then you will be brought back in and
20 sentenced to jail time. Do you understand that?

21 AC: Yes.

22 RL: Alright. I'll sentence you to 30 days then. I'll let you be screened for work crew.

EXHIBIT C

1 If you qualify, you can do your 30 days on work crew. Also order the legal financial
2 obligations that are requested, restitution if any to be set.

3 GW: We're gonna need amount.

4 RL: You want a restitution hearing set now or do you want to wait?

5 EC: I believe that we'd like to wait until we get a final figure.

6 GW: Makes sense. If there's an issue with her there'd be an issue with him.

7 RL: Alright.

8 GW: Here's where you go to make payments. Here's where you go with a phone
9 number to contact the work crew to be screened. They don't automatically accept you,
10 you have to talk with them and they have to tell you that yes they're willing to have you
11 on the program.

12 EC: So we're not doing a waiver.

13 GW: This document here is a waiver of your presence in any future restitution hearing.
14 You're certainly not required to sign it. And under the circumstances with the amount of
15 money involved my advice would probably be not to sign it. If there's a figure that they
16 come up with that we don't agree with, then you're entitled to have a hearing before the
17 Judge to set up what the actual restitution figure for DSHS should be.

18 RL: Alright I signed the document.

19 GW: Thank you.

20 ////

21 ////

22 *8 pages transcribed by Teresa Buhman of Vancouver, Washington on 7/23/14.*

EXHIBIT C

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR CLARK COUNTY

STATE OF WASHINGTON,)	Case No. 13-1-00678-2
)	
Plaintiff,	)	DECLARATION OF ALICIA
	)	OLIVARES CASTANEDA
v.)	
)	
ALICIA OLIVARES CASTANEDA,)	
)	
Defendant.)	
)	

I, Alicia Olivares-Castaneda, hereby declare the following:

I first entered the United States in 2001. I have not left the United States since entering. I intended to remain in the United States from the time I first arrived, as the opportunities in the United States are much better than those in Mexico. We (my husband and I) are from Guerrero, Mexico.

My first language is Spanish. However, in my home growing up, my parents' first languages were Mixteco and Nahuatl. They both spoke limited Spanish and spoke mostly Spanish at home. I understand Mixteco but don't really speak it. I studied Spanish in school but only attended school until the sixth grade. I speak and understand very little English. I studied English here for only a few days but could not continue with classes. I had trouble in school and I dropped out of school early. I have difficulties

1 understanding complicated things. I grew up in a very small town and never have had to
2 deal with paperwork or government regulations. I frequently depend on others to help
3 me handle personal business.

4 I have been married to my husband, Felipe Victoriano-Castaneda, for 13 years
5 and we have four U.S. citizen children; Israel Victoriano-Olivares who is 12 years old,
6 Moises Victoriano-Olivares who is 8 years old, Ruth Victoriano-Olivares, who is 6 years
7 old, and Janet Victoriano-Olivares, who is 3 years old. Becoming a legal permanent
8 resident (hereafter, LPR) of the United States has always been very important to me. It is
9 my understanding that I would have a strong chance of becoming a LPR, if not for the
10 conviction.

11 I entered my plea to Theft in the Second Degree unknowingly and involuntarily
12 due to the ineffective assistance of counsel. I did not understand the immigration penalty
13 for the plea would require my deportation from the United States with no opportunity to
14 file for cancellation of removal for non-permanent residents. My prior criminal defense
15 counsel, Mr. Wear, did not discuss the availability of a waiver through cancellation of
16 removal for non-permanent residents prior to the plea of guilty.

17 My prior criminal defense counsel, did not discuss my disqualification for
18 eligibility for the filing of a waiver for cancellation of removal, due to my plea to Felony
19 Theft, prior to the plea of guilty. My prior criminal defense counsel did not advise me
20 that, before the conviction, if I were placed into deportation proceedings, I would have
21 been eligible for Cancellation of Removal prior to the plea of guilty, or that the
22 conviction of Theft in the Second Degree disqualifies me from eligibility for Cancellation
23 of Removal.

1 Prior to my plea, I met with criminal defense counsel 2 or 3 times outside of the
2 court proceedings. Each meeting would last maybe an hour. When I spoke with criminal
3 defense counsel at his office, we spoke through an interpreter. When I would meet with
4 prior counsel, the process went very fast and the interpreter would have to leave because
5 of having other things to do. Also, the interpreter used many words that I did not
6 understand.
7

8 Before my guilty plea, I did not know what a prosecutor was and my prior
9 criminal defense counsel did not explain that to me. I recall that my prior criminal
10 defense counsel told me a lot of things and would read things to me but there was a lot
11 that I didn't understand. My prior criminal defense counsel told me that we, my husband
12 and I, had made a mistake and we were going to have to pay the consequences for that.
13 In the office of my current attorney, Nicole Dalton, I looked through paperwork that I
14 understand was evidence in the case that I plead guilty to. My prior attorney did not go
15 over those papers with me or explain them to me. I don't believe that my prior attorney
16 showed me any papers that would be evidence of the crime of which I was accused. My
17 prior attorney did not ask me questions about my knowledge of those papers or whether I
18 recognized them or did anything with them.
19

20 My prior attorney told me that a person would testify against me. My prior
21 attorney never gave me any explanation of what it meant to be guilty of the offense. My
22 current attorney, Nicole Dalton, explained to me what a trial is and how it would work.
23 Before she explained that to me, I did not know what a trial was or that I had a right to
24 fight the charges by going to trial. My prior attorney never explained to me what a trial is
25 and how it would work. Before pleading guilty, I did not know what a trial was and I do
26

1 not believe prior counsel ever indicated that I could fight the charges or told me how I
2 could do that. I remember telling prior counsel that I didn't do anything and that I had a
3 "clean heart" but I believe that my prior attorney just told me that I had to "sign guilty."
4 Based on what my prior attorney told me, I did not believe I had any choices in the matter
5 of the accusation against me. I thought that I just had to do what my prior attorney said.
6

7 My prior attorney did not explain to me anything about "intent" and he did not
8 explain to me that the state would have to prove that I acted intentionally. My prior
9 attorney never asked me whether I knew what I was doing.

10 My prior attorney did not discuss immigration consequences with me, other than
11 to tell me that "because of what happened, the immigration could pick you guys up, but
12 they didn't." I do not believe that my prior attorney discussed anything more about
13 immigration with me. As far as I understood, I was never told that I would be subject to
14 deportation and likely to be deported if I pled guilty. My prior attorney did not warn me
15 that a conviction of the charge definitely would have adverse immigration consequences
16 or that the conviction would cause me to become deportable.
17

18 I would not have entered a guilty plea to the charge had I known that I had a
19 choice and that the conviction would lead to the consequence of my deportation from the
20 United States. I was not specifically told that the conviction would require my
21 deportation from the United States by either criminal defense counsel or by the Court.
22

23 When I went through the plea petition with prior counsel, he would read it and the
24 interpreter would then tell me but sometimes the interpreter would just read it. I did not
25 really feel like I could ask questions and did not really understand the language regarding
26 immigration in the plea petition.

1
2
3 I do not recall ever hearing the following language but I am now aware that the
4 statement on plea of guilty dated July 25, 2013 states on Page 4:
5

6 If I am not a citizen of the United States, a plea of guilty to an offense punishable
7 as a crime under state law is grounds for deportation, exclusion from admission to
8 the United States, or denial of naturalization pursuant to the laws of the United
9 States.

10 I did not understand that the language here meant that my plea of guilty would
11 cause me to be deported nor did I understand that it would mean that a plea to Felony
12 Theft would result in my disqualification for eligibility for cancellation of removal for
13 certain non-permanent residents. Prior to the plea of guilty, my attorney did not tell me
14 that I could be removed from this country if I pled guilty and he did not explain that this
15 plea would mean that if I were picked up by immigration that I would not be able to
16 qualify for relief from deportation.

17 My plea of guilty was not knowing or voluntary. I did not understand the legally
18 required immigration consequences required by my plea. Had I known about these
19 consequences, and that I could fight the charge by having a jury trial, there is no doubt
20 that I would have proceeded with a jury trial. I did tell criminal defense counsel that I did
21 not believe I did anything wrong. At the time of my plea, I was not fully informed by
22 counsel of my options, nor of the possibility of prevailing at jury trial, nor of the
23 immigration penalty required by my conviction discussed above. If I had been told about
24 those options, I would have insisted on a jury trial.
25
26

1 I am currently in immigration proceedings due to this plea of guilty. I received
2 the attached Notice to Appear in the immigration court. I did not knowingly defraud
3 DSHS and I do not believe I am guilty of any crime. I understand that my cancellation of
4 removal case is a strong case because:
5

6 1) I have been continuously present in the United States for more than ten years.

7 2) I have no criminal history but for this theft conviction.

8 3) I have four U.S. citizenship children who would suffer exceptional and
9 extremely unusual hardship if I and/or my husband were deported. I stay at home with the
10 children and my husband works. We want our children to have a good education. We do
11 not know anyone who we can trust to take care of our children if we were deported.
12

13 4) If I was deported to Mexico, I would necessarily return to Guerrero. In
14 Guerrero I would expect to be a target for extortion by the gangs in Guerrero. My
15 children, if I was deported to Guerrero, would have extreme difficulty trying to adapt to
16 the living conditions there. As the boys reach their teenage years, I would expect that
17 they would be recruited by the gangs and severely hurt if they didn't join. Of course, they
18 would also be hurt if they did join a gang as the gangs fight each other and the
19 government as well. A couple of years ago, my father was threatened by people who
20 tried to extort money from him because they know I am in the United States.
21

22 5) My youngest child, who is three years old, would especially be subjected to
23 exceptional and extremely unusual hardship because her speech is delayed. She is unable
24 to communicate her needs with others. She has trouble speaking at all. She has trouble
25 pronouncing words. The words she attempts to pronounce are hard to understand. She has
26

1 been referred by her doctor to undergo a hearing and speech evaluation. She is receiving
2 help in a special program to learn to communicate better.

3 6) Additionally, I was brutally raped when I was living in Guerrero. I am afraid
4 that if I returned to Guerrero I could be targeted and hurt again and I am also afraid for
5 my husband and my children.
6

7 I hereby declare that the above statement is true to the best of my knowledge and
8 belief, and that I understand it is made for use as evidence in court and is subject to
9 penalty for perjury.

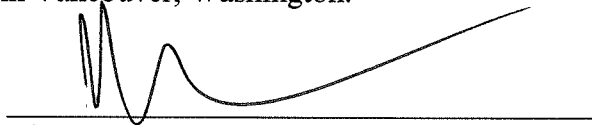
10 DATED this 23 day of July, 2014.

11 
12

13 Alicia Olivares Castaneda

14 I, Victor Montano, certify that I am a competent and Washington court certified
15 interpreter of Spanish to English and English to Spanish, and that I read the attached
16 declaration to Alicia Olivares-Castaneda in Spanish and she indicated that she understood
17 and agreed to its contents before signing.
18

19 DATED this 23 day of July, 2014 in Vancouver, Washington.

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22 Victor Montano
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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR CLARK COUNTY

STATE OF WASHINGTON,)	Case No. 13-1-00678-2
)	
Plaintiff,	)	DECLARATION OF GABRIEL
	)	GARCIA-MURILLO
v.)	
)	
ALICIA OLIVARES CASTANEDA,)	
)	
Defendant.)	
)	

I, Gabriel Garcia-Murillo, hereby declare the following:

1. I have known Alicia Olivares-Castaneda since at least 2003. I am the pastor of her church. At some point, she was given the privilege of reading the bible out loud for the congregation, but she was unable to continue because she has great difficulties with reading in the Spanish language.

2. Many times, for her to understand concepts and ideas, it is necessary to speak with her slowly and at length, in a very detailed way, for her to be able to understand. At times, she will say that she understands but it becomes obvious that she doesn't really understand. It seems to me that she will try to understand and perhaps believe she understands, but then it becomes clear that she didn't really understand.

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3. Ms. Olivares-Castaneda is a very dedicated and loving mother and wife.

4. Ms. Olivares-Castaneda is a very timid and reserved person and she doesn't like to ask questions. When she has a problem, she doesn't really like to talk about it and it's necessary to ask her questions to get her to talk.

5. I know Ms. Olivares-Castaneda to be a very honest and decent person.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

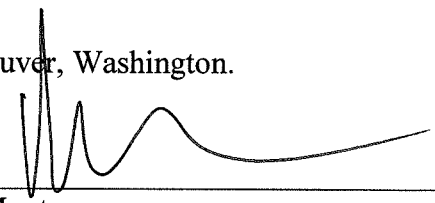
DATED this 23 day of July, 2014.



Gabriel Garcia-Murillo

I, Victor Montano, certify that I am a competent and Washington court certified interpreter of Spanish to English and English to Spanish, and that I read the attached declaration to Gabriel Garcia-Murillo in Spanish and she indicated that she understood and agreed to its contents before signing.

DATED this 23 day of July, 2014 in Vancouver, Washington.



Victor Montano

Handwritten initials or signature at the top left of the page.

FILED

2014 SEP -8 PM 3:56

SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR CLARK COUNTY

STATE OF WASHINGTON,)	Case No. 13-1-00678-2
)	
Plaintiff,	)	NOTICE OF APPEARANCE
	)	(POST-SENTENCING)
v.)	
)	
ALICIA OLIVARES CASTANEDA,)	
)	
Defendant.)	

TO: CLERK OF THE COURT, and PROSECUTING ATTORNEY

PLEASE TAKE NOTICE that Nicole T. Dalton, hereby enters her NOTICE OF APPEARANCE in the above entitled cause on behalf of ALICIA OLIVARES CASTANEDA, in the above-entitled cause. All further pleadings, papers and documents to be served herein, with the exception of original process, should be served on Nicole T. Dalton at the address indicated below.

DATED this 8th day of September, 2014.



NICOLE T. DALTON, WSB#38230
Attorney for Defendant

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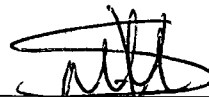
CERTIFICATION

I hereby certify that on this 8th day of September 2014, I delivered a copy of the foregoing NOTICE OF APPEARANCE

- ☐ by US mail, postage prepaid,
☒ by hand delivering the copy,
☐ by courier
☐ by e-mail
☐ by fax

to the following person at the address listed below:

☒ Clark County Prosecuting Attorney
Superior Court Division
P.O. Box 5000
Vancouver, WA 98666-5000



- ☐ Nicole T. Dalton, WSBA#38230
☒ Sabel Vazquez

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2014 SEP -9 PM 1:43
SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR CLARK COUNTY

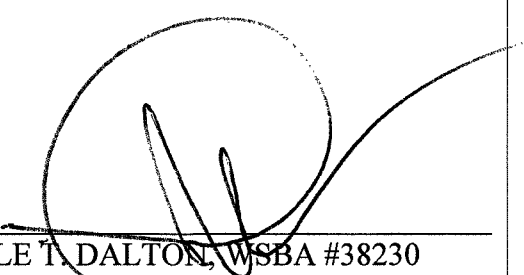
STATE OF WASHINGTON,) Case No. 13-1-00678-2
)
Plaintiff,) CITATION:
) MOTION TO VACATE
vs.) JUDGMENT AND SENTENCE
) CrR 7.8
ALICIA OLIVARES CASTANEDA,)
)
) (Out of Custody)
Defendant.)
)

TO: Clerk of the Court and
TO: Prosecuting Attorney for Clark County

PLEASE NOTE the above cause for Motion to Vacate Judgment and Sentence
CrR 7.8 at the following time:

JUDGE: Lewis
DATE: September 26th, 2014
TIME: 1:30 p.m.

Dated this 9th day of September, 2014.



NICOLE T. DALTON, WSBA #38230
Of Attorneys for Defendant

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DECLARATION OF MAILING

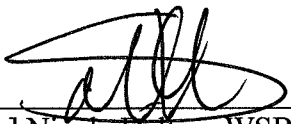
I hereby certify that on the 9th day of September, 2014, I delivered a true and correct copy of the foregoing CITATION by

- ☐ by US mail, postage prepaid,
- ☐ by facsimile,
- ☒ by hand delivery,
- ☐ by courier,

to the following person at the address listed below:

Clark County Prosecuting Attorney
Superior Court Division
P.O. Box 5000
Vancouver, WA 98666-5000

Dated this 9th day of September, 2014, at Vancouver, Washington.


[] Nicole Dalton, WSBA#38230
[X] Sabel Vazquez

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FILED

2014 SEP 11 PM 4:12

SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR CLARK COUNTY

STATE OF WASHINGTON,)	Case No. 13-1-00678-2
)	
Plaintiff,	)	DECLARATION OF GERALD
	)	WEAR
v.)	
)	
ALICIA OLIVARES CASTANEDA,)	
)	
Defendant.)	
)	

I, Gerald Wear, hereby declare the following:

I was appointed by the Clark County Superior Court to represent Ms. Olivares-Castaneda on or about May 21, 2013. I accepted the appointment and handled the matter though plea on July 25, 2013.

Ms. Olivares-Castaneda does not speak English and I do not speak her language, Spanish, so I employed qualified interpreters to communicate with her. I do not have a record of the specific interpreters used to communicate with her. I would likely have had to rely on an interpreter to get a sense of Ms. Olivares-Castaneda's mental acuity and I cannot say whether any issue existed.

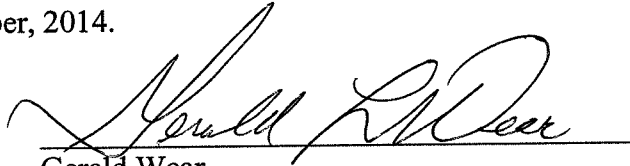
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1 I recall that Ms. Olivares-Castaneda was not educated but I do not recall ever
2 hearing that any dialects were spoken by her family. I recall that she was very quiet and
3 that her husband was not a citizen. *I believe I advised her that she*
4 *would be subject to deportation,*
although I may not have told her that she would not be able to

5 Although I typically explain the concept of intent and mens rea, I cannot *seek*
6 specifically recall whether I did so in this case. *cancellation*
of the
removal
because of
this conviction.

7 I hereby declare that the above statement is true to the best of my knowledge and
8 belief, and that I understand it is made for use as evidence in court and is subject to
9 penalty for perjury.

10 DATED this 10th day of September, 2014.

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13 Gerald Wear

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m

FILED

SEP 24 2014

Scott G. Weber, Clerk, Clark Co.

3:15pm

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

ALICIA OLIVARES CASTANEDA,

Defendant.

No. 13-1-00678-2

PRELIMINARY RESPONSE TO
DEFENDANT'S CrR 7.8 MOTION TO
VACATE JUDGMENT

I. INTRODUCTION

The defendant, represented by counsel, has filed a CrR 7.8 motion to vacate her 2013 conviction for Theft in the Second Degree. In her CrR 7.8 motion, the defendant alleges she received ineffective assistance of counsel, warranting withdrawal of her guilty plea, because his trial attorney failed to inform him of the deportation consequences of his plea.

The court has not requested response from the State. Pursuant to CrR 7.8, the court must first make a preliminary determination as to whether the defendant's motion is time-barred, and whether the defendant has either made a substantial showing she is entitled to relief, or that a factual hearing is required. If the Court makes the appropriate

1 findings and does not transfer this matter to the Court of Appeals, the court shall then
2 enter an order requiring the State to respond and appear, showing cause why relief
3 should not be granted. CrR 7.8(c)(3). The defendant's citation for a hearing on this
4 matter is premature as it appears the trial court has not considered CrR 7.8(c)(2), and
5 has not ordered the State to respond.
6

7 At this time, the State submits the following preliminary response to the
8 defendant's CrR 7.8 motion. The State, represented by Deputy Prosecuting Attorney
9 Rachael Probstfeld, herein, files this preliminary response. For the reasons set forth
10 below, it appears that the defendant has failed to demonstrate ineffective assistance of
11 counsel. Accordingly, she has failed to make a substantial showing that she is entitled
12 to relief. Consequently, the defendant's CrR 7.8 motion must be transferred to the Court
13 of Appeals for consideration as a personal restraint petition.
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16 II. FACTUAL SUMMARY

17
18 Between 2008-2010, Felipe Victoriano Castaneda and his wife, Alicia Olivares
19 Castaneda (the defendant), submitted false claims and verifications to the Department
20 of Health and Human Services ("DSHS") in which they stated they were unemployed, in
21 order to receive benefits from DSHS. DSHS later received documentation that proved
22 the defendant and her husband were both employed throughout this time period. The
23 defendant's husband was employed by Madden Craftsman, Inc. The defendant was
24 employed by Service Master. DSHS sent the defendant and her husband multiple,
25 unanswered, demands to update their employment status. Through its investigation,
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1 DSHS learned the defendant and his wife unlawfully obtained benefits totaling
2 \$8345.00.

3 4 III. PROCEDURAL HISTORY

5 The defendant and her husband were charged by information with Count One:
6 Theft in the First Degree. The defendant was represented by Gerald Wear. Both the
7 defendant and her husband pled guilty to an amended charge of Theft in the Second
8 Degree – Welfare Fraud.
9

10 The defendant pled guilty and was sentenced before the Honorable Robert Lewis
11 on July 25, 2013. In her statement on plea of guilty, the defendant acknowledged that
12 the following had been explained to her and she understood that:
13

14 If I am not a citizen of the United States, a plea of guilty to an offense punishable
15 as a crime under state law is grounds for deportation, exclusion from admission
16 to the United States, or denial of naturalization pursuant to the laws of the United
17 States.

18 See APPENDIX A, at p. 4 of 9. It is important to note that this paragraph has a hand-
19 written asterisk next to it.

20 Further, the court reviewed this information regarding the deportation
21 consequences of her plea with the defendant and the court confirmed that the
22 defendant understood these consequences, prior to accepting the defendant's plea of
23 guilty. See Defendant's Exhibit C, at p. 4 of 8. Specifically, after reviewing the
24 deportation consequences with the defendant, the court asked the defendant "do you
25 understand that?" The defendant, through her interpreter, responded "yes." *Id.*
26

27 The defendant filed the instant CrR 7.8 motion on July 24, 2014.
28
29

IV. PRELIMINARY ARGUMENT

A trial court does not have inherent authority to grant relief from judgment under CrR 7.8. Rather, under the rule, the court must first determine whether the motion is time-barred. CrR 7.8(b)(5), (c)(2). A motion is time-barred if it is filed more than one year after a final judgment is filed with the clerk of the trial court. CrR 7.8(b)(5); RCW 10.73.090. The defendant filed her motion one day prior to the one year time-bar, so her motion is timely.

If the motion is not time-barred, then the court must determine whether the defendant has made a substantial showing that she is entitled to relief or that resolution of the matter will require an evidentiary hearing. CrR 7.8(c)(2). There are 5 exclusive grounds under which the defendant may demonstrate that she is entitled to relief: (1) mistakes, inadvertence, surprise, excusable neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is void; or (5) any other reason justifying relief from the operation of judgment. CrR 7.8(b)(5). "Any other reason justifying relief" is limited to "extraordinary circumstances that are fundamental irregularities in the court's proceedings...." *State v. Olivera-Avila*, 89 Wn. App. 313, 319, 949 P.2d 824 (1997).

If the court finds the defendant's motion is not time-barred *but* she has failed to make the requisite substantial showing that she is entitled to relief, the court must transfer the defendant's motion to the Court of Appeals for consideration as a personal restraint petition. CrR 7.8(c)(2).

The court should order a show-cause hearing only if it first determines the defendant's motion is not time-barred *and* the defendant has made a substantial

1 showing that she is entitled to relief or resolution of the matter will require an evidentiary
2 hearing. CrR 7.8(c)(2), (3). An evidentiary hearing is not warranted simply because a
3 defendant claims, in her "self-serving affidavit," that there are factual disputes. *See In re*
4 *Pers. Restraint of Reise*, 146 Wn. App. 772, 789, 192 P.3d 949 (2008).

5 CrR 7.8(c)(1) requires a defendant's motion to be supported by affidavits. A
6 defendant's "self-serving affidavit," is insufficient to make a substantial showing that the
7 defendant is entitled to relief, under CrR 7.8. *See Reise*, 146 Wn. App. at 789.

8 In order to establish a claim of ineffective assistance of counsel, a defendant
9 must satisfy the two-part *Strickland* test: (1) the defendant must show that her counsel's
10 performance was objectively unreasonable; and (2) the defendant must show that as a
11 result of counsel's deficient performance, he or she suffered prejudice. *Strickland v.*
12 *Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The reviewing
13 court should presume counsel's performance was effective. *State v. Gomez Cervantes*,
14 169 Wn. App. 428, 434, 282 P.3d 98 (2012).

15 The defendant's bare assertions and self-serving statements are insufficient to
16 make a substantial showing that she was given inadequate advice by her trial counsel.
17 *See In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992) (finding a
18 defendant's bare assertions do not warrant relief in a collateral attack).

19 In *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284
20 (2010), the Supreme Court found that deportation consequences were a direct
21 consequence of a plea. Consequently, the court held an attorney must provide his or
22 her client advice about deportation consequences in order for his or her performance to
23 not be deficient. *Id.* However, the Court went on to explain that defense counsel is

1 obligated to correctly inform his or her client that pleading guilty to a particular charge
2 will lead to deportation only if the applicable immigration law is “truly clear” that the
3 offense to which the defendant is pleading guilty is deportable. *Padilla*, 559 U.S. at 369.
4 On the other hand, “if the law is not succinct and straightforward,” counsel is only
5 required to provide a general warning that “pending criminal charges may carry a risk of
6 adverse immigration consequences.” *Padilla*, at 369.
7

8 The law is not succinct and straightforward under the Immigration and Nationality
9 Act (“INA”) as to whether a plea to a theft offense in Washington will be a deportable
10 offense. *State v. Ramos*, 326 P.3d 826, 830 (2014) (finding, when the defendant pled
11 guilty to Theft in the First Degree, in violation of RCW 9A.56.030, the immigration
12 consequences of the defendant’s plea were ambiguous). Under the INA, “Any alien who
13 is convicted of an aggravated felony at any time after admission is deportable.” 8
14 U.S.C. § 1227(a)(2)(A)(iii). Further, he/she is not eligible for cancellation of removal. 8
15 U.S.C. § 1229b(a)(3) & (b)(1)(C). However, under the INA, a “theft offense” is
16 considered an aggravated felony only if the defendant is sentenced to a term of
17 imprisonment of “at least one year.” 8 U.S.C. 1101(43)(G); *Ramos*, at 831 (stating that
18 the defendant’s first degree theft conviction did not qualify as an aggravated felony
19 because he received only a 45 day sentence).¹ Next, an offense involving “fraud” is
20 considered an aggravated felony only if “the loss to the victim or victims exceeds
21 \$10,000.” 8 U.S.C. 1101(43)(M)(i).
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28 ¹ Former 8 U.S.C. § 1101(a)(43)(G)(1996), defined “aggravated felony” to include “a theft offense... for which the
term of imprisonment imposed...is at least five years.” *Ramos*, at 831.

1 Lastly, under the INA, an alien convicted of a crime involving "moral turpitude" is
2 ineligible for admission. 8 U.S.C. §1182(a)(2)(A)(i)(I). However, in order for a theft
3 conviction to constitute a crime involving moral turpitude, a "permanent taking" must be
4 intended. *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973). Because RCW 9A.56
5 never defines theft as including a "permanent taking" or an intent to "permanently
6 deprive," a conviction for theft in Washington is not a crime involving moral turpitude.
7 RCW 9A.56.020(1)(a) ("Theft' means:(a) To wrongfully obtain or exert unauthorized
8 control over the property or services of another or the value thereof, with intent to
9 deprive him or her of such property or services; or..."); RCW 9A.56.010(6) ("Deprive' in
10 addition to its common meaning means to make unauthorized use or an unauthorized
11 copy of records, information, data, trade secrets, or computer programs"); see e.g.
12 *Champion v. State*, 908 P.2d 454, 464 (Alaska Ct. App. 1995) (noting that, though intent
13 to "permanently deprive" is one of the alternative ways to commit theft in Alaska, theft
14 under the Alaskan code can be committed without the intent to permanently deprive).

15 In *Ramos*, the reviewing court found, because the immigration consequences of
16 a plea to first degree theft in Washington are not clear and succinct, the defendant's trial
17 attorney was only required to provide "a general warning that 'pending criminal charges
18 may carry a risk of adverse immigration consequences.'" *Ramos*, at 831 (citing *Padilla*,
19 at 369). Prior to his death, Ramos' attorney provided an affidavit in which he said his
20 "practice was simply to read the immigration warnings to his client." *Ramos*, at 828.
21 The court held this practice was sufficient to provide accurate advice and to defeat the
22 defendant's claim of ineffective assistance. *Id.*, at 832.
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1 **A. Under *Strickland*, the defendant has failed to demonstrate deficient**
2 **performance regarding the immigration issue.**

3 In the instant case, the defendant supports the claim that her trial attorney failed
4 to advise her of the immigration consequences of her plea with her own affidavit. Mr.
5 Wear submitted his own declaration indicating that he believes he advised Ms.
6 Castaneda that she would be subject to deportation. As discussed above, for this type
7 of crime, an attorney need only advise his client that she may be deported if convicted,
8 which the evidence shows Mr. Wear did. Not only did Mr. Wear inform Ms. Castaneda
9 of the possibility she would be deported, but the trial court did as well, and Ms.
10 Castaneda indicated in court that she understood this. The plea paperwork that Ms.
11 Castaneda signed also includes a paragraph on the possibility of deportation, and this
12 paragraph is starred on the original copy. For these reasons, the defendant's claim of
13 ineffective assistance must fail.
14

15 In addition, even if the court were to assume that any of the defendant's self-
16 serving claims were true, her claims do not establish deficient performance because the
17 law is not clear and succinct as to the immigration consequences for a plea to the crime
18 of second degree theft in Washington. According to the court in *Ramos*, because the
19 law is not clear and succinct as to the consequences for a plea to theft, trial counsel
20 was required to do nothing more than read the immigration warnings to his client in the
21 Statement on Plea of Guilty, in order to provide proficient representation. Mr. Wear's
22 affidavit, along with the asterisk on the paragraph on the plea form, and the trial court's
23 advisement shows that Ms. Castaneda was properly informed of the risk of deportation.
24 See Appendix A, at p.9; see also Defendant's Appendix C, p. 4. Furthermore, the
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1 defendant affirmed that she understood these warnings and the court confirmed that the
2 defendant understood these warnings. *Id.*; see Defendant's "Exhibit 4," at p. 4.

3 Trial counsel is presumed to provide effective representation and there is no
4 reason to doubt that he did so in this case. For each of these reasons, the defendant
5 has failed to demonstrate deficient performance by her trial attorney under the first
6 prong of the *Strickland* test.
7

8 **B. Under *Strickland*, the defendant has failed to demonstrate deficient**
9 **performance regarding the plea negotiation process.**
10

11 The defendant alleges trial counsel was ineffective for failing to discuss all her options,
12 for failing to negotiate a better resolution, and for failing to explain the trial process to
13 the defendant prior to the defendant entering a guilty plea. The only evidence of these
14 allegations is the defendant's allegations contained in her affidavit. Mr. Wear's affidavit
15 does not support these allegations.
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18 In the context of a plea agreement, a court reviews counsel's performance to
19 determine if his inadequate advice rendered the defendant's plea unknowing,
20 involuntary or unintelligent. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015
21 (2011). The defendant has the burden of showing that her counsel's ineffective
22 assistance and to overcome the strong presumption of competence. *State v.*
23 *McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Ms. Castaneda cannot
24 meet this burden and has not shown that Mr. Wear's performance rendered her plea
25 unknowing, involuntary or unintelligent.
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1 Ms. Castaneda gives little evidence to support her ineffective assistance of
2 counsel claim. A review of the transcript and the court file show that she made a
3 knowing, intelligent and voluntary plea of guilty. She received a benefit to the guilty plea
4 by a reduction in the charge, from Theft in the First Degree to Theft in the Second
5 Degree, and by an agreed recommendation to alternative confinement. Furthermore, a
6 review of the transcript of the guilty plea hearing shows Ms. Castaneda properly and
7 appropriately responded to the trial court's questions. See Defendant's Appendix C. The
8 court asked Ms. Castaneda if she had any questions, she responded no; the trial court
9 asked her if she had had enough time to speak to her attorney and she responded yes.
10 *Id.* at p. 2 She told the court she understood the crime charged, the penalty and the
11 sentencing range. *Id.* All the evidence before this court shows that the trial court
12 properly informed Ms. Castaneda of her rights, and that trial counsel properly explained
13 the process and guided Ms. Castaneda through it. She has not established Mr. Wear's
14 performance was deficient in negotiating an agreed recommendation for a plea to a
15 lesser charge.
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21 **C. Under *Strickland*, the defendant has failed to demonstrate prejudice.**

22 The court need not address the second prong of the *Strickland* test (resulting
23 prejudice) because the defendant has failed to satisfy the first prong of the test
24 (deficient performance). *Ramos*, at 832. However, for the sake of argument, the State
25 would submit that the defendant cannot demonstrate that she was prejudiced by her
26 trial attorney's actions because it is not apparent that her plea to second degree theft
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1 will, in fact, result in deportation or cancellation of removal under the INA, nor can the
2 defendant show that had she not entered the guilty plea that she would have prevailed
3 at trial or obtained a better offer. It is not apparent that Ms. Castaneda's conviction
4 would result in deportation or cancellation of removal under the INA because (1) the
5 defendant received a sentence of 30 days work crew, which is less than the one year of
6 confinement that is required to make a theft offense an aggravated felony under the
7 INA; (2) the defendant's crime involved a loss to the victim of \$8345.00, which is less
8 than the \$10,000 loss that is required to elevate a crime of fraud to an aggravated
9 felony under the INA; and (3) Washington's definition of theft does not include an
10 element of "permanent deprivation," which is required to elevate the crime of theft to a
11 crime involving moral turpitude under the INA. Ms. Castaneda therefore cannot show
12 any prejudice from her attorney's alleged deficient performance.
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17 **V. CONCLUSION**

18 The defendant's motion does not appear to be time-barred. However, the
19 defendant has failed to show that her trial attorney's performance was deficient or that
20 she was actually prejudiced. Consequently, the defendant's claim of ineffective
21 assistance must fail. Accordingly, the defendant has failed to make a substantial
22 showing that she is entitled to relief under CrR 7.8 and her motion must be transferred
23 to the Court of Appeals for consideration as a Personal Restraint Petition.
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25 The State has included a proposed order for the court to sign and file. Should
26 the court transfer this case to the Court of Appeals for consideration as a PRP, the
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1 State respectfully asks the court to attach a copy of the defendant's motion and the
2 State's response to its order.
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5 Respectfully submitted this 24th day of September, 2014.
6

7 ANTHONY F. GOLIK
8 Prosecuting Attorney
9 Clark County, Washington

10 By:

11 
12 RACHAEL PROBSTFELD, WSBA#37878
13 Deputy Prosecuting Attorney
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APPENDIX A

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FILED

JUL 25 2013
3:32
Scott G. Weber, Clerk, Clark Co

Superior Court of Washington
for

State of Washington

Plaintiff

vs.

ALICIA OLIVARES CASTANEDA
Defendant

No. 13-1-00678-2

Statement of Defendant on Plea of
Guilty to Non-Sex Offense
(Felony)
(STTDFG)

1. My true name is: Alicia Olivares Castaneda.
2. My age is: 34 years (DOB: 6-16-79).
3. The last level of education I completed was 10th Mexico
4. I Have Been Informed and Fully Understand That:
 - (a) I have the right to representation by a lawyer and if I cannot afford to pay for a lawyer, one will be provided at no expense to me.
 - (b) I am charged with: Theft in the Second Degree
The elements are: In Clark County, Washington between May 1, 2009-May 1, 2010 the defendant did wrongfully obtain or exert unauthorized control over the property (U.S. currency) over \$750⁰⁰ in value, with intent to deprive Washington Department of Social and Health Services of such property.
5. I Understand I Have the Following Important Rights, and I Give Them Up by Pleading Guilty:
 - (a) The right to a speedy and public trial by an impartial jury in the county where the crime was allegedly committed;
 - (b) The right to remain silent before and during trial, and the right to refuse to testify against myself;
 - (c) The right at trial to hear and question the witnesses who testify against me;

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- (d) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me;
- (e) The right to be presumed innocent unless the State proves the charge beyond a reasonable doubt or I enter a plea of guilty;
- (f) The right to appeal a finding of guilt after a trial.

6. **In Considering the Consequences of my Guilty Plea, I Understand That:**

- (a) Each crime with which I am charged carries a maximum sentence, a fine, and a **Standard Sentence Range** as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	COMMUNITY CUSTODY	MAXIMUM TERM AND FINE
1	0	0-60 days			5 years \$10,000
2					
3					

* Each sentencing enhancement will run consecutively to all other parts of my entire sentence, including other enhancements and other counts. The enhancement codes are: (F) Firearm, (D) Other deadly weapon, (V) VUCSA in protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (CSG) Criminal street gang involving minor, (AE) Endangerment while attempting to elude.

- (b) The standard sentence range is based on the crime charged and my criminal history. Criminal history includes prior convictions and juvenile adjudications or convictions, whether in this state, in federal court, or elsewhere.
- (c) The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.
- (d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase or a mandatory sentence of life imprisonment without the possibility of parole is required by law.
- (e) In addition to sentencing me to confinement, the judge will order me to pay \$500.00 as a victim's compensation fund assessment and any mandatory fines or penalties that apply to my case. If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The amount of restitution may be up to double my gain or double the victim's loss. The judge may also order that I pay a fine, court costs, attorney

fees and the costs of incarceration.

N/A (1)

For crimes committed prior to July 1, 2000: In addition to sentencing me to confinement, the judge may order me to serve up to one year of community custody if the total period of confinement ordered is not more than 12 months. If the total period of confinement is more than 12 months, and if this crime is a drug offense, assault in the second degree, assault of a child in the second degree, or any crime against a person in which a specific finding was made that I or an accomplice was armed with a deadly weapon, the judge will order me to serve at least one year of community custody. If this crime is a vehicular homicide, vehicular assault, or a serious violent offense, the judge will order me to serve at least two years of community custody. The actual period of community custody may be longer than my earned early release period. During the period of community custody, I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me.

N/A []

For offenses committed after July 1, 2000 but prior to July 26, 2009, the court may impose a community custody range as follows: for serious violent offenses, 24 to 36 months; for crimes against persons, 9 to 12 months; for offenses under 69.50 and 69.52, 9 to 12 months.

For crimes committed on or after July 1, 2000: In addition to sentencing me to confinement, under certain circumstances the judge may order me to serve up to one year of community custody if the total period of confinement ordered is not more than 12 months, but only if the crime I have been convicted of falls into one of the offense types listed in the following chart. For the offense of failure to register as a sex offender, regardless of the length of confinement, the judge will sentence me for up to 12 months of community custody. If the total period of confinement ordered is more than 12 months, and if the crime I have been convicted of falls into one of the offense types listed in the following chart, the court will sentence me to community custody for the term established for that offense type unless the judge finds substantial and compelling reasons not to do so. If the period of earned release awarded per RCW 9.94A.728 is longer, that will be the term of my community custody. If the crime I have been convicted of falls into more than one category of offense types listed in the following chart, then the community custody term will be based on the offense type that dictates the longest term of community custody.

OFFENSE TYPE	COMMUNITY CUSTODY TERM
Serious Violent Offenses	36 months
Violent Offenses	18 months
Crimes Against Persons as defined by RCW 9.94A.411(2)	12 months
Offenses under Chapter 69.50 or 69.52 RCW (not sentenced under RCW 9.94A.660)	12 months
Offenses involving the unlawful possession of a firearm where the offender is a criminal street gang member or associate	12 months

Certain sentencing alternatives may also include community custody.

During the period of community custody I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me, including additional conditions of community custody that may be imposed by the Department of Corrections. My failure to comply with these conditions will render me ineligible for general assistance, RCW 74.04.005(6)(h), and may result in the Department of Corrections transferring me to a more restrictive confinement status or other sanctions.

If I violate the conditions of my community custody, the Department of Corrections may sanction me up to 60 days confinement per violation and/or revoke my earned early release, or the Department of Corrections may impose additional conditions or other stipulated penalties. The court also has the authority to impose sanctions for any violation.

- (g) The prosecuting attorney will make the following recommendation to the judge:

See Appendix to Statement on Plea of Guilty which is attached.

30 days on work crew on Amended to the 2nd COSP restriction.

☐ The prosecutor will recommend as stated in the plea agreement, which is incorporated by reference.

- (h) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless it finds substantial and compelling reasons not to do so. I understand the following regarding exceptional sentences:

- (i) The judge may impose an exceptional sentence below the standard range if the judge finds mitigating circumstances supporting an exceptional sentence.
- (ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more than nine.
- (iii) The judge may also impose an exceptional sentence above the standard range if the State and I stipulate that justice is best served by imposition of an exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.
- (iv) The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proven beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

If the court imposes a standard range sentence, then no one may appeal the sentence. If the court imposes an exceptional sentence after a hearing, either the State or I can appeal the sentence.

- * (i) If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.
- (j) I may not possess, own, or have under my control any firearm unless my right to do so is restored by a superior court in Washington State, and by a federal court if required. I must

- immediately surrender any concealed pistol license.
- (k) I will be ineligible to vote until that right is restored in a manner provided by law. If I am registered to vote, my voter registration will be cancelled. Wash. Const. art. VI, § 3, RCW 29A.04.079, 29A.08.520.
- (l) Government assistance may be suspended during any period of confinement.
- (m) I will be required to have a biological sample collected for purposes of DNA identification analysis. I will be required to pay a \$100.00 DNA collection fee.

Notification Relating to Specific Crimes: *If any of the following paragraphs DO NOT APPLY, counsel and the defendant shall strike them out. The defendant and the judge shall initial all paragraphs that DO APPLY.*

- N/A (n) This offense is a most serious offense or "strike" as defined by RCW 9.94A.030, and if I have at least two prior convictions for most serious offenses, whether in this state, in federal court, or elsewhere, the crime for which I am charged carries a mandatory sentence of life imprisonment without the possibility of parole.
- _____ (o) The judge may sentence me as a first-time offender instead of giving a sentence within the standard range if I qualify under RCW 9.94A.030. This sentence could include as much as 90 days' confinement and up to two years community custody plus all of the conditions described in paragraph (e). Additionally, the judge could require me to undergo treatment, to devote time to a specific occupation, and to pursue a prescribed course of study or occupational training.
- N/A (p) The judge may sentence me under the Parenting Sentencing Alternative if I qualify under RCW 9.94A.655. If I am eligible, the judge may order DOC to complete either a risk assessment report or a chemical dependency screening report, or both. If the judge decides to impose the Parenting Sentencing Alternative, the sentence will consist of 12 months of community custody and I will be required to comply with the conditions imposed by the court and by DOC. At any time during community custody, the court may schedule a hearing to evaluate my progress in treatment or to determine if I have violated the conditions of the sentence. The court may modify the conditions of community custody or impose sanctions. If the court finds I violated the conditions or requirements of the sentence or I failed to make satisfactory progress in treatment, the court may order me to serve a term of total confinement within the standard range for my offense.
- N/A (q) If this crime involves kidnapping involving a minor, including unlawful imprisonment involving a minor who is not my child, I will be required to register where I reside, study or work. The specific registration requirements are set forth in the "Offender Registration" Attachment.
- N/A (r) If this is a crime of domestic violence, I may be ordered to pay a domestic violence assessment of up to \$100.00. If I, or the victim of the offense, have a minor child, the court may order me to participate in a domestic violence perpetrator program approved under RCW 26.50.150.
- N/A (s) If this crime involves prostitution, or a drug offense associated with hypodermic needles, I will be required to undergo testing for the human immunodeficiency (HIV/AIDS) virus.

N/A (r)

If this is a crime of domestic violence, I may be ordered to pay a domestic violence assessment of up to \$100.00. If I, or the victim of the offense, have a minor child, the court may order me to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

N/A (s)

If this crime involves prostitution, or a drug offense associated with hypodermic needles, I will be required to undergo testing for the human immunodeficiency (HIV/AIDS) virus.

N/A (t)

The judge may sentence me under the drug offender sentencing alternative (DOSA) if I qualify under RCW 9.94A.660. If I qualify and the judge is considering a residential chemical dependency treatment-based alternative, the judge may order that I be examined by DOC before deciding to impose a DOSA sentence. If the judge decides to impose a DOSA sentence, it could be either a prison-based alternative or a residential chemical dependency treatment-based alternative.

If the judge imposes the **prison-based alternative**, the sentence will consist of a period of total confinement in a state facility for one-half of the midpoint of the standard range, or 12 months, whichever is greater. During confinement, I will be required to undergo a comprehensive substance abuse assessment and to participate in treatment. The judge will also impose a term of community custody of one-half of the midpoint of the standard range.

If the judge imposes the **residential chemical dependency treatment-based alternative**, the sentence will consist of a term of community custody equal to one-half of the midpoint of the standard sentence range or two years, whichever is greater, and I will have to enter and remain in a certified residential chemical dependency treatment program for a period of *three to six months*, as set by the court.

As part of this sentencing alternative, the court is required to schedule a progress hearing during the period of residential chemical dependency treatment and a treatment termination hearing scheduled three months before the expiration of the term of community custody. At either hearing, based upon reports by my treatment provider and the department of corrections on my compliance with treatment and monitoring requirements and recommendations regarding termination from treatment, the judge may modify the conditions of my community custody or order me to serve a term of total confinement equal to one-half of the midpoint of the standard sentence range, followed by a term of community custody under RCW 9.94A.701.

During the term of community custody for either sentencing alternative, the judge could prohibit me from using alcohol or controlled substances, require me to submit to urinalysis or other testing to monitor that status, require me to devote time to a specific employment or training, stay out of certain areas, pay \$30.00 per month to offset the cost of monitoring and require other conditions, such as affirmative conditions, and the conditions described in paragraph 6(e). The judge, on his or her own initiative, may order me to appear in court at any time during the period of community custody to evaluate my progress in treatment or to determine if I have violated the conditions of the sentence. If the court finds that I have violated the conditions of the sentence or that I have failed to make satisfactory progress in treatment, the court may modify the terms of my community custody or order me to serve a term of total confinement within the standard range.

N/A (u)

If I am subject to community custody and the judge finds that I have a chemical dependency that has contributed to the offense, the judge may order me to participate in

- N/A (w) If this crime involves a violation of the state drug laws, my eligibility for state and federal food stamps, welfare, and education benefits may be affected. 20 U.S.C. § 1091(r) and 21 U.S.C. § 862a.
- N/A (x) I understand that RCW 46.20.285(4) requires that my driver's license be revoked if the judge finds I used a motor vehicle in the commission of this felony.
- N/A (y) If this crime involves the offense of vehicular homicide while under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, committed on or after January 1, 1999, an additional two years shall be added to the presumptive sentence for vehicular homicide for each prior offense as defined in RCW 46.61.5055(14).
- N/A (z) If I am pleading guilty to felony driving under the influence of intoxicating liquor or any drugs, or felony actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug, in addition to the provisions of chapter 9.94A RCW, I will be required to undergo alcohol or chemical dependency treatment services during incarceration. I will be required to pay the costs of treatment unless the court finds that I am indigent. My driving privileges will be suspended, revoked or denied. Following the period of suspension, revocation or denial, I must comply with ignition interlock device requirements.
- N/A (aa) The crime of _____ has a mandatory minimum sentence of at least _____ years of total confinement. This law does not apply to crimes committed on or after July 24, 2005, by a juvenile who was tried as an adult after decline of juvenile court jurisdiction. The law does not allow any reduction of this sentence. This mandatory minimum sentence is not the same as the mandatory sentence of life imprisonment without the possibility of parole described in paragraph 6[n].
- N/A (bb) I am being sentenced for two or more serious violent offenses arising from separate and distinct criminal conduct and the sentences imposed on counts _____ and _____ will run consecutively unless the judge finds substantial and compelling reasons to do otherwise.
- N/A (cc) The offense(s) I am pleading guilty to include(s) a Violation of the Uniform Controlled Substances Act in a protected zone enhancement or manufacture of methamphetamine when a juvenile was present in or upon the premises of manufacture enhancement. I understand these enhancements are mandatory and that they must run consecutively to all other sentencing provisions.
- N/A (dd) The offense(s) I am pleading guilty to include(s) a deadly weapon, firearm, or sexual motivation enhancement. Deadly weapon, firearm, or sexual motivation enhancements are mandatory, they must be served in total confinement, and they must run consecutively to any other sentence and to any other deadly weapon, firearm, or sexual motivation enhancements.
- N/A (ee) If I am pleading guilty to (1) unlawful possession of a firearm(s) in the first or second degree and (2) felony theft of a firearm or possession of a stolen firearm, I am required to serve the sentences for these crimes consecutively to one another. If I am pleading guilty to unlawful possession of more than one firearm, I must serve each of the sentences for

N/A

(ff)

unlawful possession consecutively to each other.

If I am pleading guilty to the crime of unlawful practices in obtaining assistance as defined in RCW 74.08.331, no assistance payment shall be made for at least six months if this is my first conviction and for at least 12 months if this is my second or subsequent conviction. This suspension of benefits will apply even if I am not incarcerated. RCW 74.08.290.

N/A

(gg)

The judge may authorize work ethic camp. To qualify for work ethic authorization my term of total confinement must be more than twelve months and less than thirty-six months, I cannot currently be either pending prosecution or serving a sentence for violation of the uniform controlled substance act and I cannot have a current or prior conviction for a sex or violent offense.

7.

I plead guilty to:

count

count

count

in the

Theft in the Second Degree

amended

Information. I have received a copy of that Information.

8.

I make this plea freely and voluntarily.

9.

No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

10.

No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

11.

The judge has asked me to state what I did in my own words that make me guilty of this crime. This is my statement:

In Clark County, Washington between May 1, 2009 - May 1, 2010
I admit to wrongfully obtaining and exercising unauthorized controls
over the property (US currency) over \$750⁰⁰ in value, with intent to
deprive Washington Department of Social and Health Services of
such property.

[] Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.

12.

My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" Attachment, if applicable. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

[Signature]
Defendant

I have read and discussed this statement with the defendant. I believe that the defendant is competent and fully understands the statement.

EC
Prosecuting Attorney
CULVER 35678
Print Name WSBA No.

[Signature]
Defendant's Lawyer
Gerald L. Weir
Print Name WSBA No. 6315

The defendant signed the foregoing statement in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that [check appropriate box]:

- ☐ (a) The defendant had previously read the entire statement above and that the defendant understood it in full;
- ☐ (b) The defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full; or
- ☒ (c) An interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full. The Interpreter's Declaration is included below.

Interpreter's Declaration: I am a certified or registered interpreter, or have been found otherwise qualified by the court to interpret in the SPANISH language, which the defendant understands. I have interpreted this document for the defendant from English into that language. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at (city) Vancouver, (state) WA, on (date) 7/25/13.
[Signature] CARMEN VERNIER
Interpreter Print Name

I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

Dated: 7/25/13 [Signature]
Judge

STATE OF WASHINGTON V. ALICIA OLIVARES CASTANEDA - CAUSE NO 13-1-00678-2

CLARK COUNTY PROSECUTING ATTORNEY'S OFFICE OFFER OF SETTLEMENT

TO: DEFENSE ATTORNEY GERALD L WEAR, WSBA #06315

The defendant is charged with the following:

Count	Charge	Score	Range	Enhancement	Total Range
01	THEFT IN THE FIRST DEGREE	0	0 days – 90 days	-	0 days – 90 days

The State makes the following Offer of Settlement. In accepting this offer, the defendant is agreeing to stipulate to its terms and recommendations, unless otherwise noted. The offer is: 1) based on the accompanying Declaration of Criminal History which the defendant acknowledges is accurate, true and complete and further that the resultant offender score calculations in this offer are correct; 2) supersedes any previous offer made in this case; 3) is exclusive to the above referenced cause number(s), unless otherwise noted. Furthermore, defendant understands and agrees that the failure of the defendant to declare disputed criminal history or to disclose additional criminal history or to dispute the resultant offender score calculations prior to entering any plea of guilty constitutes a breach of this agreement by the defendant.

This offer may be withdrawn at any time prior to the entry of a guilty plea, or it otherwise expires on Thursday, July 25, 2013.

If the defendant pleads guilty to the following, the State will recommend confinement, costs, conditions and supervision as outlined in this offer.

Count	Charge	Score	Range	Enhancement	Total Range
01	AMENDING: THEFT IN THE SECOND DEGREE	0	0 days – 60 days	-	0 days – 60 days

☐ In lieu of a plea of guilty, Defendant may be referred to the CCPA Diversion Unit for screening on the above charges. Defendant must waive speedy trial and agree to a delay in setting a trial date.

☐ The State will refer this case for Drug Court screening. Request for referral for Drug Court screening must be made not less than 30 days before the date set for trial.

RECOMMENDATION AS TO CONFINEMENT

☐ Days ☐ Months in Total Confinement, and
30 ☒ Days ☐ Months Partial Confinement [30 days Work Crew; _____ days Work Release], and
 _____ Days Community Restitution (Service) (Eight (8) hours per day)
 _____ Days with _____ days suspended/deferred on a misdemeanor/gross misdemeanor
 If the defendant does not qualify for partial confinement program(s), the recommendation will be for total confinement.

TERMS APPLICABLE TO ALL RECOMMENDATIONS

This offer includes credit for time served in custody solely on this case, up to the date of sentencing. It also includes standard conditions of supervision including reporting to DOC. This offer is exclusive to the above referenced cause number(s), unless otherwise noted.

All recommendations include court costs of \$200.00; crime victim's compensations fee of \$500; fine of \$500; biological collection fee of \$100.00; appointed attorney's fees, and any related defense costs, such as investigator fees, expert witness fees, transcription fees, etc. which have been or will be paid by order of the court. To accept this offer, defendant agrees to pay restitution (in an amount presently understood to be to be set) which could be established or modified by the court at a later date based on additional information. The defendant agrees to pay restitution to victims of uncharged crimes contained in the discovery, and/or dismissed counts.

Defendant shall comply with directions of the DOC and the Clerk of the Court regarding reporting and paying any financial obligations and comply with financial monitoring as required by statute.

Other legal financial obligations include:

Drug Fund: _____ Lab Fee: _____ Warrant Fees: _____

DV Assessment: _____ Extradition Costs: _____ Cleanup fine: _____
Other of fees: _____ for _____ Emergency Response Fee: _____

SUPERVISION

- ☐ Community Custody for _____ months.
- ☐ First Offender Option with up to two years of supervision
- ☐ _____ Years of probation/supervision on misdemeanor/gross misdemeanor.

MANDATORY SENTENCE REQUIREMENTS

- ☐ No possession/use/ownership of firearms/surrender concealed pistol license
- ☐ Provide biological sample for DNA identification
- ☐ HIV testing
- ☐ Revocation/suspension of driver's license per RCW 46.20.285, RCW 69.50.420
- ☐ Register as Sex/Kidnapping Offender per RCW 9A.44.130 and RCW 10.01.200
- ☐ Domestic Violence Perpetrator's Program

OTHER CONDITIONS OF SUPERVISION AND AGREEMENT

(This list is non-exclusive – the State is free to recommend other usual conditions)

- ☐ The defendant shall perform affirmative acts necessary to monitor compliance with the orders of the court as required by the Department of Corrections (DOC) and shall comply with the instructions, rules and regulations of DOC for the conduct of the defendant during the period of community supervision/custody. Defendant shall receive permission from DOC prior to moving.
- ☐ Treatment for: ☐ substance abuse; ☐ mental health; ☐ anger control; ☐ other _____
- ☐ No use/ possession of alcohol and controlled substances. U/A and BA testing authorized.
- ☐ A chemical dependency screening report shall be ordered unless the defendant stipulates to having a chemical dependency that contributed to his/her offense.
- ☐ No violations of federal, state, or local criminal laws.
- ☐ No contact with Victim(s) for _____ years.
- ☐ Notify community corrections officer within 48 hours of any arrest or citation.
- ☐ No contact with other participants in the crime: _____
- ☐ Forfeiture of the following property: _____
- ☐ No possession of other people's identification.

- ☒ ***This agreement requires Defendant to admit relevant conduct. Absent advance notice and consent of the undersigned prosecutor, pleas which do not admit relevant conduct (Newton or Alford pleas) are not allowed. Defendant breaches this agreement if he enters such a plea without prior approval of the prosecutor.***

- ☒ OTHER Stipulated agreement. Defendant agrees to full restitution.

If the defendant fails to appear for sentencing, commits any additional crimes between pleading guilty and sentencing, or otherwise breaches this agreement or if Defendant later moves to withdraw this plea or collaterally attack the conviction under this cause number, the defendant understands and agrees that the State will be free to make any recommendation(s) it deems appropriate or to re-file any dismissed or withheld counts, enhancements or aggravating factors but that that the defendant may not withdraw his plea of guilty in the event the State elects any of these remedies.

In the event the State, defendant or the court requests a DOSA screening, the State makes no representation as to the eligibility of the defendant for a sentence under the DOSA provisions. If found not to be eligible, defendant understands and agrees that he is still bound by his plea of guilty.

This offer form must be attached to the Statement of Defendant on Plea of Guilty.

Patrick Robinson
Deputy Prosecuting Attorney, WSBA #40028

7/8/13

Date

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

ALICIA OLIVARES CASTANEDA,

Defendant

Date of Birth: 6/16/1979

No. 13-1-00678-2

APPENDIX 2.2
DECLARATION OF CRIMINAL HISTORY



COME NOW the parties, and do hereby declare, pursuant to RCW 9.94A.525 that to the best of the knowledge of the defendant and his/her attorney, and the Prosecuting Attorney's Office, the defendant has the following undisputed prior criminal convictions:

CRIME	COUNTY/STATE CAUSE NO.	DATE OF CRIME	DATE OF SENTENCE	DV*? YES	PTS.
No known felony convictions.					

*DV: Domestic violence was pled and proved.

☐ The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

DATED this 8 day of July, 2013.

Defendant

Gerald L Wear, WSBA#06315,
Attorney for Defendant

PATRICK ROBINSON, WSBA#40028
Deputy Prosecuting Attorney

DECLARATION OF CRIMINAL HISTORY
Revised 9/14/2000

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
(360) 397-2230 (FAX)

APPENDIX B

D
C work crew
Gerald Wear



FILED
JUL 25 2013
3:41
Scott G. Weber, Clerk, Clark Co

Superior Court of Washington
County of Clark

State of Washington, Plaintiff,

vs.

ALICIA OLIVARES CASTANEDA, aka
ALICIA OLIVARES-VAZQUEZ,
Defendant.

SID: WA27169992
If no SID, use DOB: 6/16/1979

No. 13-1-00678-2 ✓

Felony Judgment and Sentence --
Jail One Year or Less

(FJS) 13-9-03150-6

☒ Clerk's Action Required, 2.1, 4.1, 4.3, 5.2, 5.3,
5.5, 5.7

☐ Defendant Used Motor Vehicle

☐ Juvenile Decline ☐ Mandatory ☐ Discretionary

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court **Finds:**

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon
☒ guilty plea 7/25/2013 ☐ jury-verdict ☐ bench trial :

Count	Crime	RCW (w/subsection)	Class	Date of Crime
01	THEFT IN THE SECOND DEGREE - WELFARE FRAUD	74.08.331/9A.08.020(3)/ 9A.56.040(1)(a)	FC	5/1/2009 to 5/1/2010

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C),
(If the crime is a drug offense, include the type of drug in the second column.)

☐ Additional current offenses are attached in Appendix 2.1a.

The jury returned a special verdict or the court made a special finding with regard to the following:

☐ The defendant used a **firearm** in the commission of the offense in Count _____ RCW 9.94A.825,
9.94A.533.

☐ The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____
_____. RCW 9.94A.825, 9.94A.533.

Felony Judgment and Sentence (FJS) (Jail One Year or Less)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (7/2010))
Page 1 of 10

15

- ☐ Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a **minor** in order to involve that minor in the commission of the offense. RCW 9.94A.833.
- ☐ Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A. _____.
- ☐ The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- ☐ For crime(s) charged in Count _____ domestic violence was pled and proved. RCW 10.99.020.
- ☐ Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW 46.20.285.
- ☐ Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score (RCW 9.94A.589).
- ☐ **Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

	Crime	Cause Number	Court (County & State)
1.			

- ☐ Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History:

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	DV?*	Type
1	No known felony convictions						

* DV: Domestic Violence was pled and proved.

- ☐ Additional criminal history is attached in Appendix 2.2.
- ☐ The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- ☐ The prior convictions for _____ are one offense for purposes of determining the offender score (RCW 9.94A.525).

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term	Maximum Fine
01	0	I	0 DAYS to 60 DAYS		0 DAYS to 60 DAYS	5 YEARS	\$10,000.00

(F) Firearm, (D) Other deadly weapons, (CSG) criminal street gang involving minor.

- ☐ Additional current offense sentencing data is attached in Appendix 2.3.

2.4 ☐ Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

- ☐ below the standard range for Count(s) _____.
- ☐ above the standard range for Count(s) _____.
- ☐ The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.
- ☐ Aggravating factors were ☐ stipulated by the defendant, ☐ found by the court after the defendant waived jury trial, ☐ found by jury, by special interrogatory.
- ☐ within the standard range for Count(s) _____, but served consecutively to Count(s) _____.
- Findings of fact and conclusions of law are attached in Appendix 2.4. ☐ Jury's special interrogatory is attached. The Prosecuting Attorney ☐ did ☐ did not recommend a similar sentence.

Felony Judgment and Sentence (FJS) (Jail One Year or Less)

(RCW 9.94A.500, .505)(WPF CR 84.0400 (7/2010))

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that:

☒ The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

☐ The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

☐ The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

3.1 The defendant is **guilty** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 ☐ The court **dismisses** Counts _____ in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant as follows:

(a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the county jail:

0 months/days on Count 01

Actual amount of total confinement ordered is: 30 Days/Months.

The Sentence shall be served as follows:	
<input checked="" type="checkbox"/> Days	<input type="checkbox"/> Months credit for time served
<input type="checkbox"/> Days	<input type="checkbox"/> Months of additional total confinement
<u>30</u> <input checked="" type="checkbox"/> Days	<input type="checkbox"/> Months of additional Partial Confinement , if approved and eligible, may be served as:
<input type="checkbox"/> Days	<input type="checkbox"/> Months on work/education release
<u>30</u>	Days on work crew – Defendant shall report within 24 hour of this order/release from custody
	Days on work crew – Defendant shall be screened while in custody
	Days of Community Service/Restitution as an Alternative Conversion to part or all of the jail sentence. (Converted at a rate of 8 hours = 1 day, and a maximum of 30 days)

All counts shall be served concurrently, except for the following which shall be served consecutively:

The sentence herein shall run consecutively with any other sentence previously imposed in any other case, including other cases in District Court or Superior Court, unless otherwise specified herein: _____

Confinement shall commence immediately unless otherwise set forth here: _____

Credit for Time Served: The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute earned early release credits (good time) pursuant to its policies and procedures.

Partial Confinement. If granted above, if the defendant has been referred to work crew and is determined to be medically unfit to perform the work crew by the Clark County Corrections unit, Corrections may screen the defendant for community service in lieu of the work crew obligation, if legally allowed, and if they accept him/her in their program. Corrections shall obtain medical verification of the defendant's medical disability and the defendant shall provide any waivers necessary to allow Corrections to obtain said medical information. The Corrections staff shall supervise the defendant to insure compliance. If the defendant is found to be medically unfit for work crew and not acceptable for community service, Corrections shall provide the defendant a return date to Court for further review by the court. No other court order is necessary to do this conversion.

Alternative Conversion. RCW 9.94A.680. If granted above, Defendant shall serve the sentence of Community Service under the supervision of the Department of Corrections (DOC) to be completed:

- ☐ on a schedule established by the defendant's community corrections officer.
☐ as follows: _____

<input type="checkbox"/>	Alternatives to total confinement were not used because of:
<input type="checkbox"/>	Criminal history
<input type="checkbox"/>	Failure to appear (finding required for nonviolent offenders only). RCW 9.94A.380
<input type="checkbox"/>	Defendant has served all of confinement.
<input type="checkbox"/>	Other: _____

☐ **Conversion of Jail Confinement (Nonviolent and Nonsex Offenses).** RCW 9.94A.680(3). The county jail is authorized to convert jail confinement to an available county supervised community option, to reduce the time spent in the community option by earned release credit consistent with local correctional facility standards, and may require the offender to perform affirmative conduct pursuant to RCW 9.94A.607.

- ☐ The defendant shall receive credit for time served in an available county supervised community option prior to sentencing. The jail shall compute time served.

4.2 Community Custody. RCW 9.94A.505, .702.

(A) The defendant shall serve _____ months (up to 12 months) in community custody.

The court may order community custody under the jurisdiction of DOC for up to 12 months if the defendant is convicted of a violent offense, a crime against a person under RCW 9.94A.411, or felony violation of chapter 69.50 or 69.52 RCW or an attempt, conspiracy or solicitation to commit such a crime. For offenses committed on or after June 7, 2006, the court shall impose a term of community custody under RCW 9.94A.701 if the offender is guilty of failure to register (second or subsequent offense) under RCW 9A.44.130(11)(a) and for offenses after June 12, 2008 for unlawful possession of a firearm with a finding that the defendant was a member or associate of a criminal street gang. The defendant shall report to DOC not later than 72 hours after release from custody at the address provided in open court or by separate document.

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition;

(7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The court orders that during the period of supervision the defendant shall:

- ☐ consume no alcohol;
- ☐ have no contact with: _____
- ☐ remain ☐ within ☐ outside of a specified geographical boundary, to wit: _____
- ☐ participate in the following crime-related treatment or counseling services: _____
- ☐ undergo an evaluation for, and fully comply with, treatment for ☐ domestic violence ☐ substance abuse
☐ mental health ☐ anger management.
- ☐ comply with the following crime-related prohibitions: _____
- ☐ Additional conditions are imposed in Appendix 4.2, if attached or are as follows: _____

(C) The conditions of community custody shall begin immediately upon release from confinement unless otherwise set forth here: _____

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE

RTN/RJN	\$ To Be Set	Restitution to: _____ (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
PCV	\$ 500.00	Victim assessment	RCW 7.68.035
PDV	\$ _____	Domestic Violence assessment	RCW 10.99.080
CRC	\$ _____	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee \$ 200.00	FRC
		Witness costs \$ _____	WFR
		Sheriff service fees \$ _____	SFR/SFS/SFW/WRF
		Jury demand fee \$ _____	JFR
		Extradition costs \$ _____	EXT
		Other \$ _____	
PUB	\$ 1,000.00	Fees for court appointed attorney and trial per diem, if applicable	RCW 9.94A.760
WFR	To Be Set	Court appointed defense expert and other defense costs	RCW 9.94A.760
	\$ _____	DUI fines, fees and assessments	

FCM/MTH \$ 500.00 Fine RCW 9A.20.021; ☐ VUCSA chapter 69.50 RCW, ☐ VUCSA additional fine deferred due to indigency RCW 69.50.430

CDF/LDI/PCD \$ Drug enforcement Fund # ☐ 1015 ☐ 1017 (TF) RCW 9.94A.760
NTF/SAD/SDI

\$ 100.00 DNA collection fee RCW 43.43.7541

CLF \$ Crime lab fee ☐ suspended due to indigency RCW 43.43.690

FPV \$ Specialized forest products RCW 76.48.140

RTN/RJN \$ Emergency response costs (Vehicular Assault, Vehicular Homicide, Felony DUI only, \$1000 maximum) RCW 38.52.430

Agency: _____

\$ Other fines or costs for: _____

\$ Total RCW 9.94A.760

☒ The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

☒ shall be set by the prosecutor.

☐ is scheduled for _____ (date).

☐ The defendant waives any right to be present at any restitution hearing (sign initials): _____

☐ Restitution Schedule attached.

☐ Restitution ordered above shall be paid jointly and severally with:

RJN	Name of other defendant	Cause Number	Victim's name	Amount

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$AS ESTABLISHED per month commencing _____
RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

☐ The court orders the defendant to pay costs of incarceration at the rate of \$ _____ per day, (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

☐ **HIV Testing.** The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

- ☐ The defendant shall not have contact with _____ including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (which does not exceed the maximum statutory sentence).
- ☐ The defendant is excluded or prohibited from coming within:
- ☐ 500 feet ☐ 880 feet ☐ 1000 feet of:
- ☐ _____ (name of protected person(s))'s
- ☐ home/ residence ☐ work place ☐ school
- ☐ (other location(s)) _____
- ☐ other location _____
- for _____ years (which does not exceed the maximum statutory sentence).
- ☐ A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed concurrent with this Judgment and Sentence.

4.6 Other: _____

4.7 Off-Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

- 4.8** For Offenders on Community Custody, when there is reasonable cause to believe that the defendant has violated a condition or requirement of this sentence, the defendant shall allow, and the Department of Corrections is authorized to conduct, searches of the defendant's person, residence, automobile or other personal property. Residence searches shall include access, for the purpose of visual inspection, all areas of the residence in which the defendant lives or has exclusive/joint control/access and automobiles owned or possessed by the defendant.
- 4.9** If the defendant is removed/deported by the U.S. Immigration and Customs Enforcement, the Community Custody time is tolled during the time that the defendant is not reporting for supervision in the United States. The defendant shall not enter the United States without the knowledge and permission of the U.S. Immigration and Customs Enforcement. If the defendant re-enters the United States, he/she shall immediately report to the Department of Corrections if on community custody or the Clerk's Collections Unit, if not on Community Custody for supervision.

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your

offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Community Custody Violation.

- (a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633.
(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5 Firearms. You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.6 Reserved.

5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

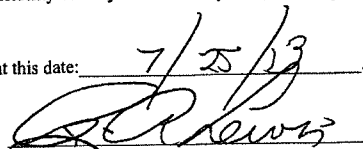
5.8 Other: _____

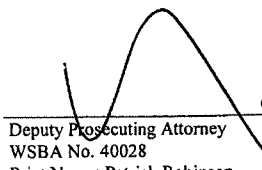
5.9 Persistent Offense Notice

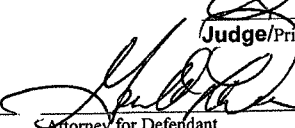
The crime(s) in count(s) _____ is/are "most serious offense(s)." Upon a third conviction of a "most serious offense", the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody. RCW 9.94A.030, 9.94A.570

The crime(s) in count(s) _____ is/are one of the listed offenses in RCW 9.94A.030.(31)(b). Upon a second conviction of one of these listed offenses, the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody.

Done in Open Court and in the presence of the defendant this date: 7/15/13


Judge/Print Name:


Deputy Prosecuting Attorney
WSBA No. 40028
Print Name: Patrick Robinson

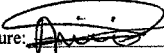

Attorney for Defendant
WSBA No. 06315
Print Name: Gerald L Wear


Defendant
Print Name: ALICIA OLIVARES CASTANEDA

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

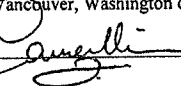
My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: 

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in the SPANISH language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Vancouver, Washington on (date): 7/25/13

Interpreter: 

Print Name CARMEN VERNIER

I, Scott G. Weber, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date: _____.

Clerk of the Court of said county and state, by: _____, Deputy Clerk

Identification of the Defendant

ALICIA OLIVARES CASTANEDA

13-1-00678-2

SID No: WA27169992

Date of Birth: 6/16/1979

(If no SID take fingerprint card for State Patrol)

FBI No. 662484VD3

Local ID No.

PCN No. _____

Other _____

Alias name, DOB: , aka ALICIA OLIVARES-VAZQUEZ, ALICIA OLIVARES-VAZQUEZ

Race: W

Ethnicity:

Sex: F

Fingerprints: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court, Deputy Clerk, _____

Dated: 7/25/13

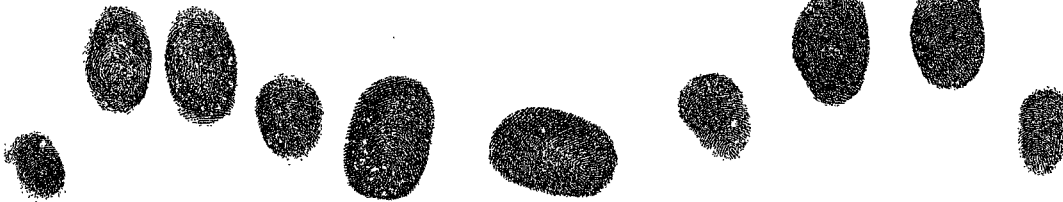
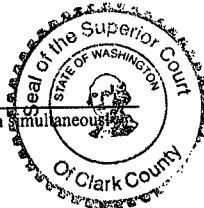
The defendant's signature: _____

Left four fingers taken simultaneously

Left
Thumb

Right
Thumb

Right four fingers taken simultaneously



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

vs.

ALICIA OLIVARES CASTANEDA

Defendant.

No. 13-1-00678-2

ORDER RE CrR 7.8 MOTION

CLERK'S ACTION REQUIRED

Copies to Defendant and Prosecuting Attorney

THIS MATTER having come before the Court for initial consideration on the motion and affidavit(s) of Defendant herein, pursuant to Criminal Rule 7.8, and the Court being fully advised in the premises, the Court:

- ☐ Having determined that the motion is not barred by RCW 10.73.090 (motion was filed within one year of date judgment and sentence became final or judgment and sentence is invalid on its face), but having determined that the Defendant has not made a substantial showing that s/he is entitled to relief or that an evidentiary hearing will be necessary to resolve the motion on the merits, hereby transfers this matter to the Court of Appeals for its consideration as a personal restraint petition.
- ☐ Having determined that the motion is not barred by RCW 10.73.090, and, either:
- ☐ having determined that the Defendant has made a substantial showing that s/he is entitled to relief; or
 - ☐ determination of this matter will require an evidentiary hearing to resolve the motion on the merits;

hereby directs the Clark County Prosecuting Attorney to appear on _____ at _____ and show cause as to why the relief requested should not be granted.

DATED this _____ day of _____, 2014.

JUDGE ROBERT LEWIS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

JUDGE ROBERT LEWISCAUSE NO. 13-1-00678-2PROS ATTY Klein-P

STATE OF WASHINGTON

DEFENSE ATTY ~~WEARD~~ DALTON -P

VS.

REPORTER CD/VIDEOCASTANEDA, ALICIA OCLERK WONG

AKA _____ DOB _____

INTERPRETER C. Vernier - PDATE SEPTEMBER 26, 2014 @ 1:53 PMASSIGNED DEPT # 3

P.O. _____

MOTION TO VACATE JUDGMENT AND SENTENCE

Defendant Appeared (Yes) No In Custody (No) Warrant Authorized _____ Warrant Outstanding _____
 Deft Answers to True Name as Charged X Advised of Civil & Constitutional Rights _____
 Charges _____

Referral for Financial Screening/ Interview _____ Attorney _____ Appointed/ Retained/ Waived

Personal Recognizance/ Supervised Release Granted / Denied . Release Revoked _____

Order for Psych Eval at WSH _____ Orders signed _____

Bail \$ _____ With Conditions Set/ Return to Court to Be Set/ Previously set. Bail Posted By: _____

Diversion Referral/ Confirmation _____ Stay Granted _____ PV: Admit Deny Set Hrg _____

Next Court Appearance _____ Time _____ For Arraign _____ Omnibus _____ Payment Rev _____

PV tracking with _____ Trial in Dept # _____ Other _____

NOT GUILTY PLEA/MOTION TO CONTINUE

Information Served on Defendant _____

Not Guilty Plea Entered _____

Readiness Hearing Date _____ RS 1:30PM

Waiver of Speedy Trial Signed _____

Motion For Continuance of Trial Granted _____ Denied _____

Trial Date _____ [_____]

GUILTY PLEA Original/ Amended

Statement on Plea of Guilty _____ Sgnd

Psych Evaluation Ordered _____

Pre-sentence Report Ordered _____

Dismissal of Counts # _____

Sentencing Date _____

SENTENCING

Courts Finds the Defendant:

_____ Guilty as Charged Based on Plea of Guilty

_____ Convicted by the Jury _____ Court _____

_____ in violation based on admissions

Defendant is Sentenced to Jail /DOC for _____ Days/ Months/ Years to be Served as Follows:

CTS _____ JAIL _____ WORK RELEASE _____ WORK CREW _____ COMM SERV _____

Misdemeanor Sent. _____ days with _____ days suspended/ deferred on conditions for _____ months/ years.

Community Custody / Placement _____ Mos. SSOSA _____ HIV/ DNA _____ DNA Fee \$ _____

Court Costs \$ _____ Fine \$ _____ Drug Fund \$ _____ Atty Fees \$ _____ Extdt \$ _____

Restitution \$ _____ Victim Assess \$ _____ Lab Fee \$ _____ DV Penalty \$ _____

Judgment & Sentence Sgnd _____ Defendant Fingerprinted Yes/No Other Costs \$ _____

Deft is Advised of His/ Her Rights to Appeal _____ Deft Served With Map to DOC / COLLECTIONS _____

Court Sets Appeal Bond at \$ _____ Attorney _____ Appointed for Appeal.

Attorney Dalton states she has no objection to Ms. Vernier interpreting
Court so notes.

Court notes that it had no notice that hearing was on for today.
Court strikes hearing

19
24

FILED
2014 OCT -2 PM 12:07
SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR CLARK COUNTY

STATE OF WASHINGTON,)	Case No. 13-1-00678-2
)	
Plaintiff,	)	RESPONSE TO STATE'S REPLY
	)	TO DEFENSE MOTION TO
v.	)	VACATE JUDGMENT AND
	)	SENTENCE
ALICIA OLIVARES CASTANEDA,)	
)	
Defendant.)	
)	

ARGUMENTS

I. The Prosecution's Arguments That the Conviction in this Matter Does Not Carry Clear Immigration Consequences Directly Contradicts Substantial Precedent

The prosecution attempts to convince that court that the charge of Theft in Washington is not an aggravated felony or a crime involving moral turpitude (CIMT) under immigration law. However, the prosecution fails to counter defendant's clear argument that the conviction for "WELFARE FRAUD" constitutes a deportable crime involving moral turpitude, where a sentence of one year or longer may be imposed. *Rusz v. Ashcroft*, 376 F.3d 1182, 1184 (9th Cir. 2004). Had the conviction been entered as solely a "theft" conviction, with no record of welfare fraud, the prosecution's arguments might have made some sense. However, the conviction is clearly defined as a "fraud"

1 conviction in the record and the prosecution does not address the CIMT grounds. In its
2 answer, the state totally ignores the alternative “fraud” grounds of establishing a CIMT
3 offense.

4 In relying on *State v. Ramos*, 326 P.3d 826 (2014) the prosecution has attempted
5 to negate the clear consequences of the welfare fraud conviction here by attempting to
6 analogize a case where the consequences of conviction were linked to the “aggravated
7 felony” grounds for removal. However, the prosecution confuses the fraud based CIMT
8 deportation grounds with the theft based CIMT grounds for deportation and denial of
9 relief. No clear statutory definition for CIMT exists and determining which crimes are
10 “aggravated felonies” or “crimes involving moral turpitude [CIMT]” is not an easy task.
11 *Padilla v. Kentucky*, 559 U.S. 356, 378 (2010). However, substantial case law exists to
12 aid in reaching firm conclusions about the categorization of particular crimes.
13
14

15 Because RCW 74.08.331 encompasses both CIMT and non-CIMT behavior, it is
16 not categorically CIMT. Thus, to determine whether the offense here was CIMT, it is
17 necessary to move to a modified categorical approach. Under the modified categorical
18 approach, an adjudicator can look at a limited set of judicially noticeable documents from
19 the record of conviction that go to the element of guilt. *Taylor v. United States*, 495 U.S.
20 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005). These documents generally
21 include the charging document; the plea petition; the judgment of conviction; jury
22 instructions; a signed guilty plea or the transcript from the plea proceedings; the sentence
23 and transcript from sentence hearing; and other similar documents.
24

25 Here, the amended information clearly defines the charges as Theft in the Second
26 Degree and Welfare Fraud. The judgment and sentence here also specifies “Theft” and

1 “Welfare Fraud” and cites to both controlling statutes. The prosecution here attempts to
2 rely on the ambiguity of Washington’s theft statute, but clear precedent exists in
3 immigration law to indicate that welfare fraud is a CIMT offense.

4
5 In *In re Cortez*, the Immigration Authority found that California Welfare Fraud
6 was a crime of moral turpitude and rendered an undocumented alien ineligible for
7 cancellation of removal under Section 240A(b)(1)(C) of the Act. *In re Cortez*, 25 I. & N.
8 Dec. 301, 306 (B.I.A. 2010) (“**We concur with the Immigration Judge's conclusion**
9 **that the respondent's welfare fraud is a crime involving moral turpitude, because it**
10 **has as an element the intent to defraud.** *See McNaughton v. INS*, 612 F.2d 457, 459
11 (9th Cir. 1980) [“A crime having as an element the intent to defraud clearly is one
12 involving moral turpitude.”]) (emphasis added). *In re Cortez* mirrors exactly the
13 circumstances in the present case and clearly establishes that the Defendant here is
14 subject to deportation and not eligible for Cancellation of Removal for Nonpermanent
15 Residents due to her conviction of this CIMT offense based on her unknowing and
16 involuntary plea to Welfare Fraud.

17
18 The California Welfare Fraud statute on which *In re Cortez* revolves is defined
19 under section 10980(c)(2) of the California Welfare and Institutions Act and is defined in
20 pertinent part as follows:
21

22 Whenever any person has, willfully and knowingly, with the intent to deceive, by
23 means of false statement or representation, or by failing to disclose a material
24 fact, or by impersonation or other fraudulent device, obtained or retained aid
under the provisions of this division for himself or herself or for a child not in fact
entitled thereto, the person obtaining this aid shall be punished as follows:

25

26 (2) If the total amount of the aid obtained or retained is more than four hundred
dollars (\$ 400), by imprisonment in the state prison for a period of 16 months, two

1 years, or three years, by a fine of not more than five thousand dollars (\$ 5,000), or
2 by both imprisonment and fine; or by imprisonment in the county jail for a period
3 of not more than one year, by a fine of not more than one thousand dollars (\$
1,000), or by both imprisonment and fine.

4 Cal. Welf. & Inst. Code § 10980(c)(2) (West 2007) *as cited by In re Canales*, 25 I. & N.

5 Dec. 301, 305 (B.I.A. 2010). The classification of the welfare conviction crime as a
6 CIMT offense is based on the element of *fraud*, and the language of the Washington
7 statute closely mirrors the above-mentioned CIMT California offense, in pertinent part.

8 The Washington Welfare Fraud statute defines welfare fraud and provides in pertinent
9 part:
10

11 Any person who by means of a willfully false statement, or representation,
12 or impersonation, or a willful failure to reveal any material fact, condition,
13 or circumstance affecting eligibility or need for assistance, including
14 medical care, surplus commodities, and food stamps or food stamp
15 benefits transferred electronically, as required by law, or a willful failure
16 to promptly notify the county office in writing as required by law or any
17 change in status in respect to resources, or income, or need, or family
18 composition, money contribution and other support, from whatever source
19 derived, including unemployment insurance, or any other change in
20 circumstances affecting the person's eligibility or need for assistance, or
other fraudulent device, obtains, or attempts to obtain, or aids or abets any
person to obtain any public assistance to which the person is not entitled
or greater public assistance than that to which he or is justly entitled is
guilty of theft in the first degree under RCW 9A.56030 and upon
conviction thereof shall be punished by imprisonment in a state
correctional facility for not more than fifteen years.

21 RCW 74.08.331(1). Substantial case law clearly indicates that crimes involving fraud,
22 like the Washington Welfare Fraud offense in this case, are CIMT offenses. *See Jordan v.*
23 *De George*, 341 U.S. 223, 230 (U.S. 1951); *Robles-Urrea v. Holder*, 678 F.3d 702, 705
24 (9th Cir. 2012) (quoting *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1074-75 (9th Cir.
25 2007) "A crime involving moral turpitude is either one that involves fraud or one that
26 involves grave acts of baseness or depravity, such that its commission 'offend[s] the most

1 fundamental [moral] values of society."(en banc) (Reinhardt, J., concurring for the
2 majority)); *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir. 1980) ("A crime having as
3 an element the intent to defraud clearly is one involving moral turpitude."); *but see In re*
4 *Garcia-Madruga*, 24 I. & N. Dec. 436, 437 (B.I.A. 2008) (California welfare fraud does
5 not meet the definition of a theft-based *aggravated felony* offense.) The aiding and
6 abetting language in the Washington statute does not alter the analysis as an aiding and
7 abetting theory as grounds for conviction do not insulate a defendant from the
8 immigration consequences of welfare fraud. *See In re Garcia-Madruga*, 24 I. & N.
9 Dec. 436, 437 (B.I.A. 2008).

11 Although a position contrary to existing law can be argued in a good faith attempt
12 to change existing law, the prosecution should not be allowed to effectively use that
13 approach to mischaracterize the offense at hand as an offense without clear immigration
14 consequences. Clear guidance exists from courts to support the conclusion that Ms.
15 Olivares Castaneda's Welfare Fraud conviction is a CIMT offense for which no petty
16 offense exception is available and the prosecution's arguments that the immigration
17 consequences of the conviction are not clear is meritless. Researching case law or
18 consultation with an immigration attorney would render a definite answer to the question
19 of whether the immigration consequences of this conviction are clear. Had prior counsel
20 thoroughly explained those clear consequences to Ms. Olivares Castaneda, she would not
21 have plead guilty to the charge.

24 /// /// ///

1 II. Ms. Olivares Castaneda has Stated With Particularity, Facts which, If Proven,
2 Would Entitle Her to Relief

3 The state argues that Ms. Olivares Castaneda is relying on a “self-serving
4 affidavit” to establish factual dispute in this matter. However, the state’s argument is
5 based on something of a misstatement of the applicable legal standard. By misstating the
6 legal standard, the state would have the court ignore the facts stated with particularity in
7 the affidavits filed (not contradicted by prior defense counsel’s affidavit), that should
8 entitle Ms. Olivares Castaneda to relief, or at the very least should warrant a fact finding
9 hearing.
10

11 The prosecution cites *In re Rice*, 118 Wn.2d 876, 828 P.2d 1086 (1992), (*writ*
12 *denied* at 491 U.S. 910, 109 S. Ct. 3200, 105 L. Ed. 2d 707 (1989)) as support for the
13 proposition that the “defendant’s bare assertions and self-serving statements are
14 insufficient to make a substantial showing” that she was given inadequate advice by trial
15 counsel. However, the language proposed by the prosecution is not an accurate reflection
16 of the standards set by the higher courts. The prosecution here has given its desired
17 interpretation of the holding rather than directly quoting the actual language used by the
18 *Rice* court, which appears as follows:
19

20 Bald assertions and conclusory allegations will not support the holding of a
21 hearing. *See In re Williams*, 111 Wn.2d 353, 364-65, 759 P.2d 436 (1988).
22 Rather, with regard to the required factual statement, the petitioner must state with
23 particularity facts which, if proven, would entitle him to relief.

24 *In re Rice*, 118 Wn.2d 876, 886 (1992). By inaccurately restating the holding in *Rice*, the
25 state is effectively asking this court to adopt an unprecedented black letter reading of an
26 incomplete version of existing law.

1 The standard of proof the state wishes to establish here is not nearly as demanding
2 as portrayed, even in the context of review of personal restraint petitions. In *re Pers.*
3 *Restraint of Yates*, 177 Wn.2d 1, 18 (2013), the court clarified the standard in that
4 context, quoting *Rice*:

5 To establish a prima facie showing required for a reference hearing, a petitioner
6 must offer “the facts underlying the claim of unlawful restraint and the evidence
7 available to support the factual allegations.” *In re Pers. Restraint of Rice*, 118
8 Wn.2d 876, 885-86, 828 P.2d 1086 (1992) (PRP of Rice). Mere “[b]ald assertions
9 and conclusory allegations” are insufficient to justify a reference hearing. *Id.* at
10 886. For “matters outside the existing record, the petitioner must demonstrate that
11 he has competent, admissible evidence to establish the facts that entitle him to
12 relief”; if the “evidence is based on knowledge in the possession of others,” the
13 petitioner may either “present their affidavits” or present evidence to corroborate
14 what the petitioner believes they will reveal if subpoenaed. n2 *Id.* **The**
15 **corroboration must be more than mere speculation or conjecture. *Id.***

16 *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 18 (2013) (emphasis added). Here,
17 Ms. Olivares Castaneda’s testimony is competent and admissible. Her allegations are
18 fact specific and substantive and prior counsel’s declarations tend to support her
19 assertions, as independent corroboration. Additionally, Ms. Castaneda has presented
20 other independent corroboration regarding the intellectual limitations. No speculation or
21 conjecture has been put forth in the matter at hand and Ms. Olivares Castaneda has made
22 the required showing.

23 Neither the court record nor materials submitted by the prosecution or defense
24 counsel contain any evidence to contradict Ms. Olivares Castaneda’s assertion that she
25 did not understand the legal system, or that she did not understand her right to demand
26 proof of not only the transactions but of her alleged intent to fraudulently deprive another
of the resources in question. Ms. Olivares had no real knowledge of her options and no
evidence exists to contradict her assertions.

1 The state has not cited any cases holding that it would be appropriate for the *trial*
2 *court* to refuse an evidentiary hearing using the same standard as a reviewing court on a
3 personal restraint petition. Rather, the state simply and mistakenly alleges the existence
4 of some flat prohibition on “self-serving affidavits” and conclusively asserts no right to a
5 hearing although no such prohibition exists.
6

7 Affidavits are sometimes contraindicated where the established record contradicts
8 the assertions, but circumstances where they would not be considered have been clearly
9 defined, for example, as follows:

10 “When a party has given clear answers to unambiguous [deposition] questions
11 which negate the existence of any genuine issue of material fact, that party cannot
12 thereafter create such an issue with an affidavit that merely contradicts, without
13 explanation, previously given clear testimony.” *Klontz v. Puget Sound Power &*
14 *Light Co.*, 90 Wn. App. 186, 192, 951 P.2d 280 (1998) (quoting *Marshall v. AC &*
15 *S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989)). But in *Safeco Ins. v.*
16 *McGrath*, 63 Wn. App. 170, 817 P.2d 861 (1991), the court found the above rule
inapplicable where the subsequent sworn testimony was not in “flat contradiction”
to previous testimony. In *Safeco*, the subsequent testimony was used to offer
explanation of the prior sworn statements. 63 Wn. App. at 174-75.

17 *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 111 (1999).¹

18 Here, applying the proper standard, the assertions made by the defendant are not
19 bald or lacking in specificity. As discussed above, the accurately quoted passage in *Rice*
20 does not establish that a defendant’s declarations regarding communications with counsel
21 are insufficient to warrant the holding of a hearing. Rather, the passage indicates that a
22 statement of facts with particularity is needed.
23

24
25 ¹ (“Self-serving affidavits contradicting prior depositions cannot be used to create an issue of material fact. ‘When a party has
26 given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact,
that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously
given clear testimony.’”) (quoting *Klontz v. Puget Sound Power & Light Co.*, 90 Wn. App. 186, 192, 951 P.2d 280 (1998));
see also *Almquist v. Finley Sch. Dist. No. 53*, 114 Wn. App. 395, 403, 57 P.3d 1191 (2002) (“We also need not entertain
arguments that are patently inconsistent with positions advanced at trial.”), *review denied*, 149 Wn.2d 1035 (2003).

1 Ms. Olivares Castaneda has made a specific showing that she suffers from mental
2 challenges, in the form of an affidavit from a third party, and she has specifically
3 described the information that prior counsel did not provide that would have caused her
4 to make a different decision, and not accept the proposed plea.
5

6 In the case at hand, as in almost any other criminal matter, no one besides prior
7 counsel and the defendant is in a position to provide information about the content of
8 communications between defense counsel and the defendant. The problem of proof
9 posed by the legal requirements of confidentiality should not be used by the state as a
10 sword to prevent a defendant from presenting competent evidence of irregularities or
11 insufficient performance.
12

13 Contrary to the prosecution's assertions, the law does not require defendants to
14 provide evidence that would, in most circumstances, be practicably impossible for them
15 to obtain regarding the content of their conversations with counsel. If prior counsel were
16 able to contradict the assertions, the questions might be resolved differently. But here,
17 prior counsel cannot and does not directly contradict Ms. Olivares Castaneda's assertions.
18

19 The declaration filed by prior defense counsel also reinforces Ms. Olivares
20 Castaneda's complaints because prior counsel does not have a record of which interpreter
21 was used to communicate with counsel outside of court, in private conversations, and
22 prior counsel is not able to say whether any issues existed as to her mental acuity.
23 Although prior counsel has indicated that he typically explains the concepts of intent and
24 *mens rea*, he is unable to specifically recall whether he did so in this matter.

25 /// /// ///

1 III. A Perfunctory Colloquy with Yes and No Responses is Insufficient to
2 Overcome Doubts Regarding Ms. Olivares Castaneda's Competency and Her
3 Comprehension of the Legal Process and her Options

4 The prosecution in this matter relies heavily on the plea colloquy that took place
5 in open court to establish that the Ms. Olivares Castaneda make a knowing and intelligent
6 waiver of her rights and that she was adequately informed about the plea. Federal courts,
7 however, have found that a perfunctory colloquy with "yes" or "no" responses at a plea
8 hearing are insufficient to overcome some doubts regarding competency. In *Miles v.*
9 *Stainer*, the 9th Circuit Court of Appeals found that a plea colloquy was not sufficient to
10 establish the competency of a defendant who had gone off his medication before the time
11 of plea:

12 The state-court plea colloquy consisted almost entirely of yes or no questions
13 which shed little light on complex reasoning ability. *See United States v.*
14 *Christensen*, 18 F.3d 822 (9th Cir. 1994) (short, perfunctory colloquy is
15 inadequate basis for waiver of right to jury trial when judge is on notice of
16 defendant's possible mental or emotional instability); *see also Godinez*, 972 F.2d
 at 265 (monosyllabic responses at plea hearing are insufficient to overcome doubt
 raised by medication).

17 *Miles v. Stainer*, 108 F.3d 1109, 1112-1113 (9th Cir. Cal. 1997).

18 In the case at hand, the prosecution seeks to use monosyllabic responses at a plea
19 hearing as proof to overcome serious doubts about complex matters: the Defendant's
20 mental abilities, and her understanding of the explanations she may have been given
21 outside of court by counsel, across a language barrier, using an unidentified interpreter.

22 The court here should find that an evidentiary hearing is needed to establish: 1)
23 Ms. Olivares Castaneda's mental competency; 2) whether counsel provided the necessary
24 explanations of the judicial system and process to effectively facilitate her ability to make
25 a knowing and intelligent choice; and 3) whether the interpreter used by counsel outside
26 a knowing and intelligent choice; and 3) whether the interpreter used by counsel outside

1 of court, to discuss her options, effectively communicated the content of counsel's
2 explanations. Additionally, the hearing is needed to establish whether the explanations of
3 the justice system given to Ms. Olivares Castaneda by counsel, through interpreter, could
4 have reasonably formed the basis of a knowing and intelligent plea in this matter.

5
6 In *State v. Holley*, Division II of the Washington Court of Appeals, prior to the
7 *Padilla* decision, considered the burden of proof in the context of post-conviction relief
8 where counsel was alleged to have failed to provide adequate immigration advice:

9 The affidavit evidence in the record before this court is insufficient to permit
10 resolution of the issues raised by Holley on appeal. **However, Holley's affidavit**
11 **evidence, when viewed in the light most favorable to Holley, would disprove**
12 **the presumed fact: that he was advised of the potential deportation**
13 **consequences associated with his guilty pleas. Thus, he is entitled to a hearing**
14 **to attempt to persuade the trial court, by a preponderance of the evidence,**
that he did not receive the statutory warnings and that, further, conviction of
the offenses to which he pleaded guilty may have the consequence of
deportation. RCW 10.40.200(2).

15 *State v. Holley*, 75 Wn. App. 191, 200 (1994) (emphasis added). Even though the plea
16 agreement there contained required advisements, the *Holley* Court held that "the court is
17 not required to infer that the defendant was advised of the relevant plea consequences
18 upon a showing that he signed a plea agreement containing such an advisement,
19 regardless of contrary evidence." See *State v. Johnson*, 100 Wn.2d 607, 674 P.2d 145
20 (1983); *State v. Delmarter*, 68 Wn. App. 770, 845 P.2d 1340 (1993)." *Id.* at 200 (1994).
21

22 Here, Ms. Olivares Castaneda has presented uncontroverted testimony that she
23 was not given a comprehensible explanation of the right to a jury trial, the *mens rea*
24 element, or that the clear immigration consequences of her plea would be deportation
25 without relief.
26

1 A defendant must be able to contest his prior admission of guilt in his motion to
2 withdraw, or the purpose of the motion would be meaningless. *United States v. Leung*,
3 783 F. Supp. 357, 360 (N.D. Ill. 1991) (citing *Menna v. New York*, 423 U.S. 61, 62, N.2
4 (1975)). A counseled plea of guilty is only a reliable admission of factual guilt when
5 intelligently and voluntarily made. *Id.* In *Leung*, the court reversed the defendant's
6 guilty plea, citing to linguistic and cultural differences that interfered with his ability to
7 understand the import of his plea and indicated that something more than yes or no
8 responses was needed to assure understanding:

10 **Defendant Leung's claim of linguistic and cultural differences causing a lack**
11 **of understanding constitutes a fair and just reason for withdrawal of his**
12 **prior plea of guilty.** In determining whether a plea should be withdrawn on the
13 ground that it was not given voluntarily or intelligently, a trial court must of
14 necessity turn to its colloquy with the defendant at his plea hearing. *Ellison*, 835
15 F.2d at 693; *Fountain*, 777 F.2d at 355 (more meticulously Rule 11 is adhered to,
16 the more it discourages frivolous attacks on constitutionality of pleas). The extent
17 of the dialogue required between the court and the defendant to establish an
18 intelligent and voluntary plea varies from case to case, but in all cases it must be a
19 meaningful dialogue. **Simple yes or no answers, or answers which merely**
20 **mimic the indictment will not suffice. The court should question the**
21 **defendant in a way that provokes a narrative response.** *Fountain*, 777 F.2d at
22 356.

23 *U.S. v. Leung*, 783 F. Supp. 357, 360 (N.D. Ill. 1991) (emphasis added).

24 Courts have also found the need for an evidentiary hearing where the defendant
25 indicates lack of understanding, even where the record shows a significant exchange on
26 the record:

The questions posed by the court prior to its acceptance of the guilty plea appear
to be simple and straightforward. **The defendant does not claim nor does the**
record suggest that he required an interpreter or that he was mentally
deficient. Although most of the factual assertions in the defendant's offer of proof
are vague, conclusory and oblique, the record of the plea proceedings does not
conclusively refute the defendant's assertion that he did not fully understand the
plea proceedings either because the questions were rapid or because there was not

1 sufficient interchange between court and accused. If in fact there was a sufficient
2 lack of understanding of the plea proceedings for either of these reasons, then the
3 plea cannot truly be said to be voluntary. Because we cannot say on the basis of
4 the present record that under no circumstances could the defendant establish a
5 basis for relief under § 721; *see Fontaine v. United States, supra*; the defendant
6 was entitled to an evidentiary hearing on the extent to which he understood the
7 plea proceedings.

8 *State v. Torres*, 182 Conn. 176, 187 (Conn. 1980) (emphasis added). Unlike the
9 defendant in *Torres*, there are indications here that the defendant is mentally challenged
10 or deficient, which suggests an even greater need for an evidentiary hearing.

11 In *Valencia v. United States*, the federal appeals court succinctly affirmed the
12 need for courts to examine the defendant's understanding of the essential elements of the
13 charges, despite the entry of a plea:

14 We cannot think that the interests of justice would be served by a rule which deems a
15 guilty plea a waiver of the right to challenge an essential element of the crime
16 charged even though it was never explained to the defendant.

17 923 F.2d 917, 922 (1st Cir. P.R. 1991).

18 Here, a *pro forma* plea was entered and a colloquy requiring almost exclusively
19 "yes" or "no" answers from the defendant was conducted. No evidence in the record
20 shows that the charges and rights were *explained* to the defendant in language and
21 terminology that she could understand, rather than just reading the formal, codified
22 warnings. Ms. Olivares Castaneda did not make a knowing and intelligent plea, with any
23 real consciousness of the rights she was giving up or the options that existed for her in the
24 American justice system.

25 /// /// ///

1 IV. Linguistically Marginalized Immigrants Face Greater Challenges in
2 Understanding their Options and Counsel's Efforts to Clarify Understanding
3 are Necessary to Ensure Knowing and Intelligent Pleas

4 Immigrants who speak a different language and who are raised without education or
5 in countries of origin with very different legal system face particular barriers in
6 comprehending legal proceedings in the United States. The National Institute of Justice
7 conducted a national survey regarding access to justice in the criminal justice system for
8 immigrants. See National Institute of Justice: Research in Brief, *Immigrant Populations*
9 *as Victims: Toward a Multicultural Criminal Justice System*. May 1998. Available at
10 <https://www.ncjrs.gov/pdffiles/167571.pdf>.

11 In the first phase, a survey was sent to police chiefs, prosecutor, and court
12 administrators from the fifty largest U.S. cities and 61 percent of officials who received
13 the survey responded. *Id.* In the second phase of the study, researchers interviewed
14 samples of victims in areas with high immigrant populations. *Id.* Researchers in the
15 study found that barriers beyond language barriers created increased difficulties for those
16 involved in the system:
17

18 About two-thirds of the respondents believed that recent immigrants face greater
19 hardships when reporting crimes to the police. Language poses the greatest hardship,
20 said 47 percent. Respondents also named other hardships such as cultural differences
21 in conceptions of justice (22 percent) and lack of knowledge of the criminal justice
22 system (15 percent).

23 Recent immigrants face greater hardships in coming to court as well, said two-thirds
24 of the responding officials. Again language was named most often (39 percent of
25 respondents) as a hardship in involvement with court. Respondents indicated that the
26 language barrier poses no problem in communicating with officials because
interpreters are often available. Rather, they stated that immigrants have trouble
understanding court proceedings conducted in English even when they are translated.

Id.

1 Other scholarly writers have examined the difficulties in obtaining justice for
2 persons who are linguistically and culturally marginalized. In many cases, the obstacles
3 are not simply overcome by providing an interpreter.

4 Many individuals born and raised in foreign countries confront other practical
5 obstacles [in addition to language barriers] to obtaining justice. Some lived in a
6 country where police and authority figures terrorize its citizens. Immigrants from
7 these countries often distrust and fear the police in the United States. Many
8 immigrants lack familiarity with our legal system or have limited, if any,
9 understanding of constitutional rights and other procedures.

10 Some defendants, victims, or witnesses by other cultures may be misunderstood,
11 or their actions, appearance, or demeanor misinterpreted by police, parties, jurors,
12 or the court itself. This is because social and behavioral norms of persons from a
13 foreign country may appear suspect because they are not within the common
14 experience of native-born Americans.

15 Cole & Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign*
16 *Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W.
17 *New Eng. L. Rev.* 193, 195 (1997). A defendant's level of sophistication, the quality,
18 content and extent of formal education, and cultural behavioral norms can cause real
19 barriers to understanding.

20 Cultural language barriers may affect whether a defendant is able to make a
21 voluntary confession, knowingly and voluntarily consent to a search, waive the
22 right to trial by jury, or fully understand the elements of the charge, the rights
23 waived, and the effect of the plea in the plea bargaining process. Lack of
24 knowledge of the American legal system, rights under the Constitution, English
25 language difficulties, and cultural background differences, along with other
26 factors, have been considered in judicial assessments of whether there is a
voluntary and knowing waiver of such rights.

Id. at 196. Because of these difficulties, when dealing with clients from a different
cultural background, defense counsel faces additional challenges to provide thorough and
adequate counsel:

1 Defense counsel should also explore with the defendant any cultural biases or
2 barriers that could affect his or her representation, including the preparation and
3 presentation of the defendant's case ... Defense counsel should take the time to
4 explain the nature of the criminal justice system, the jury system, the role of
5 police and prosecutors, and the rights of a criminal defendant.

6 Cole & Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign*
7 *Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W.
8 New Eng. L. Rev. at 200 (1997).

9 Although the state would like the court to use the existence of a colloquy to
10 negate the defendant's claims here, the court should examine the actual record and
11 consider factors analyzed by other courts in the context of validity of waivers. When
12 courts examine whether waivers are made knowingly and intelligently, an appropriate
13 inquiry should cover all circumstances, including the defendant's age, experience,
14 education, background, and intelligence. See *U.S. v. Nakhoul*, 596 F.Supp. 1398
15 (D.Mass. 1984), *aff'd sub nom* by *U.S. v. El-Debeib*, 802 F.2d 442 (1st Circuit 1986)
16 (Waiver of Miranda rejected where the defendant was locked up alone in a windowless
17 room and questioned by two unfamiliar investigators, due to limitations on his
18 understanding of American law, customs, and constitutional rights).

19 In a quick proceeding with only a completed plea petition and a colloquy of "yes"
20 and "no" questions, the judge has little ability to ascertain the defendant's experience,
21 background and intelligence. "Any translation is inevitably a screen placed between the
22 witness and the jury, affecting the jury's ability to assess credibility from demeanor,
23 inflection of voice, nuances of language, and details of testimony." *State v. Casipe*, 686
24 P.2d 28, 33 (Haw. Ct. App. 1984); *State v. Fung*, 907 P.2d 1192, 1194 (Utah Ct. App.
25 1995). Just as translation may functionally act as a screen for the trier of fact, so may that
26

1 translation create a real barrier to understanding between the court or counsel and the
2 defendant.

3 Typically, with the brief nature of plea proceedings, it would be incumbent upon
4 counsel to point it out to the court if counsel were aware of any concerns about cultural or
5 intellectual barriers to the defendant's ability to understand. Where counsel does not
6 inform the court of these issues, and without substantial questioning outside of the basic
7 "yes" or "no" colloquy, the judge is not in a position to independently evaluate those
8 factors. Counsel, however, should conduct an investigation reasonably calculated to
9 ascertain the extent of such cultural impediments to communications and make efforts to
10 provide the defendant with a real understanding of options.
11

12 In the matter at hand, Ms. Olivares Castaneda indicates that she was unfamiliar
13 with the justice system, American or otherwise, and did not understand the concept of a
14 jury trial, the burden of proof, the concept of *mens rea*, or the availability of a process to
15 effectively contest the charges against her. Although a basic colloquy took place on the
16 record, the colloquy is not a comprehensive explanation of the process, but rather, a
17 streamlined recitation of certain procedural and substantive guarantees, with mostly "yes"
18 or "no" responses. Without a more basic understanding of the structure and function of
19 the trial system, this recitation was devoid of meaning for Ms. Olivares Castaneda, her
20 plea was not knowing or intelligently made, and prior counsel failed to provide
21 explanations to overcome the lack of understanding.
22

23
24 /// /// ///

1 V. Without Specifically Identifying the Interpreter Used to Communicate with
2 Ms. Olivares Castaneda Outside the Courtroom About the Process, Her Rights
3 and the Plea Offer, the State Cannot Contradict that Ms. Olivares Castaneda's
4 Did Not Receive Adequate Information in a Language She Could Understand
5 to Support a Knowing and Intelligent Plea

6 In *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 3-4 (U.S. 1992), a Cuban immigrant with
7 little education and almost no knowledge of English brought a collateral attack on a plea
8 to first degree manslaughter where he averred that his plea was not knowing and
9 intelligent, that the *mens rea* was not accurately translated and that he thought he was
10 agreeing to be tried for manslaughter, rather than pleading guilty. The United States
11 Supreme Court there held that the defendant there was entitled to an evidentiary hearing,
12 if he could show cause for failure to develop the facts in state court. *Tamayo-Reyes*, 504
13 U.S. at 11-12 (U.S. 1992).

14 Even though lower courts there found that an interpreter had interpreted the
15 proceedings including the plea, finding the that the in-court interpreter has translated
16 “correctly, fully and accurately” the communications between the respondent and his
17 attorney, the Supreme Court held that the facts were not fully developed by appellate
18 counsel and, as such, those findings were not dispositive of his claim. *Id.* at 3-4.

19 As in the case of *Tamayo-Reyes*, the record here is insufficient to determine
20 whether *all* interpretation provided in the matter, and in particular the out-of-court
21 interpretation, was adequate and effective. The interpreter for court proceedings in the
22 matter has been identified on the record and is fully competent and court certified.
23 However, prior counsel has not been able to identify the interpreter used outside court
24 proceedings to discuss the case, procedural and constitutional rights, and other details
25 necessary to making informed choices about whether to accept a plea or insist on a jury
26

1 trial. At the very least, a hearing should be held to find additional facts relating to
2 communications between counsel and the defendant that took place outside the
3 courtroom.
4

5 RESPECTFULLY SUBMITTED this 15th day of October, 2014.

6
7
8 
9 NICOLE T. DALTON, WSBA#38230
Attorney for Defendant

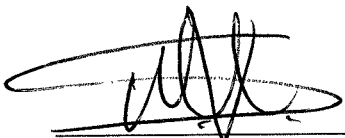
10 **CERTIFICATION**

11 I hereby certify that on this 1st day of October, 2014, I delivered a copy of the
12 foregoing RESPONSE TO STATE'S REPLY TO DEFENSE MOTION TO VACATE
JUDGMENT AND SENTENCE

13 ☐ by US mail, postage prepaid,
14 ☒ by hand delivering the copy,
15 ☐ by courier
☒ by facsimile

16 to the following person at the address listed below:

17 Clark County Prosecuting Attorney
18 1013 Franklin Street
19 PO Box 5000
Vancouver, WA 98666

20 
21 ☐ Nicole T. Dalton, WSBA#38230
22 ☐ Tory M. Stewart
23 ☒ Sabel Vazquez
24
25
26

CLARK SUPERIOR COURT

October 07, 2014 - 2:22 PM

Transmittal Letter

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Case Name: State of Washington v Alicia Olivares Castaneda

County Cause Number: 13-1-00678-2

Court of Appeals Case Number:

✓ Personal Restraint Petition (PRP) Transfer Order

Notice of Appeal/Notice of Discretionary Review

(Check All Included Documents)

Judgment & Sentence/Order/Judgment

Signing Judge: _____

Motion To Seek Review at Public Expense

Order of Indigency

Filing Fee Paid - Invoice No: ____

Affidavit of Service

Clerk's Papers - Confidential Sealed

Supplemental Clerk's Papers

Exhibits - Confidential Sealed

Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Administrative Record - Pages: ____ Volumes: ____

✓ Other: Misc. Supporting Documents

Co-Defendant Information:

No Co-Defendant information was entered.

Comments:

No Comments were entered.

Sender Name: Heather D Hunt